S. HRG. 99-579

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 397

A BILL TO AMEND THE SHERMAN ACT AND THE CLAYTON ACT TO MODIFY THE APPLICATION OF SUCH ACTS TO INTERNATIONAL COMMERCE

JUNE 21 AND OCTOBER 15, 1985

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FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985—S. 397

FRIDAY, JUNE 21, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Dennis DeConcini (acting chairman) presiding.

Also present: Senators Metzenbaum and McConnell.

Staff present: Kenneth Starling, committee antitrust counsel; Robert Feidler, minority counsel; Steve Ross, minority counsel; and Victor Maddox, legislative assistant.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. The Judiciary Committee will come to order. Due to a scheduling problem he is experiencing, Senator Thurmond has asked me to commence the hearings this morning. Unfortunately, I also have scheduling problems that will take me away from here at 20 past the hour. I believe another Senator will come at that time.

Let me first say that I appreciate the willingness of Senator Thurmond to proceed with these hearings, and I hope that we can pass this bill onto the Senate floor with a favorable recommendation.

The bill before the committee today is one that I know of no interest groups that are pushing it. Its support comes from a broad spectrum of the bar, business and academia; all who support it as just good government.

As the developed world has become more economically interdependent, and the United States has come increasingly to rely on its trading partners, it has become painfully obvious that the assertion of U.S. antitrust jurisdiction over conduct abroad has generated serious international tensions. The extraterritorial features of our antitrust laws have forced many of our foreign trading partners to enact retaliatory legislation to respond to what they believe to be the improper assertion of jurisdiction by U.S. courts. The interests of the United States and its citizens would be better served if we worked to eliminate international antitrust conflicts.

Earlier this session, I introduced S. 397, the Foreign Trade Antitrust Improvements Act of 1985. This legislation provides the U.S. courts with the statutory authority and procedural tools necessary to minimize conflicts with our major trading partners, arising from the application of U.S. antitrust laws to international commerce. At the same time, S. 397 safeguards the effectiveness of our antitrust laws in protecting competition and the U.S. consumers. I have received many favorable comments on this legislation. These comments have come from leaders in Government, industry, the academic community, and the bar, both in the United States and abroad. Because the central purpose of my legislation is to reduce unnecessary conflicts over antitrust between the United States and its allies, I am especially pleased that a number of distinguished foreign observers of the U.S. antitrust have responded most favorably to S. 397.

I am going to ask at this time, without objection, that the full text of my remarks to the Senate on February 6, 1985, be printed in the record along with an opening statement by Chairman Thurmond.

[Statements follow:]

By Mr. DeCONCINI:

S. 397. A bill to amend the Sherman Act and the Clayton Act to modify the application of such acts to international commerce; to the committee on the Judiciary.

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

Mr. DeCONCINI. Mr. President, I am today introducing legislation dealing with the serious economic and political problems that arise in applying United States antitrust laws to international trade and commerce.

Since the Sherman Act was first passed into law in 1890, U.S. antitrust laws have applied not only to commerce contained within the boundaries of the United States, but also to commerce with foreign nations. In many cases this is as it should be, for often transactions involving foreign firms or goods have a critical impact on the interests of the United States. Indeed, the importance to the United States of such foreign commerce has increased dramatically in recent years. The United States can and must stand ready to exercise its legislative and judicial power to avoid the substantial harm to American interests that can result from attempts by U.S. companies or foreign companies to subvert the free marketplace of the United States.

As the developed world has become more economically interdependent and the United States has come increasingly to rely upon its trading partners, however, the full exercise of U.S. power in implementing its antitrust laws to their full letter in international cases has caused substantial frictions with our foreign friends and allies. Such frictions can be seen, for example, in the shipping cases of the 1960's and 1970's, the uranium cases of the 1970's, and the air transportation cases now pending in the Federal courts. Without commenting on the merits of any of these disputes, is is clear that, just as the United States had some legitimate interest it believed that it was protecting, so too did our foreign trading partners. Sometimes these interests of foreign nations may be in regulating international commerce of vital importance to them in ways that are inconsistent with our methods of regulation; sometimes the difference is not so much in the substance of the regulation as it is in the legitimate desire of foreign nations to have the primary right to specify the rules by which the conduct of their citizens, or the actions of others primarily affecting their citizens, are to be judged. In either case, the simple and undeniable truth is that legitimate governmental interests can and do collide in certain cases where U.S. authorities seek to enforce the full letter of the present U.S. antitrust laws.

It is in the best interests of the United States and of its citizens to minimize the extent of the conflicts that arise in international antitrust cases. Vital foreign policy, defense, and commercial interests of the U.S. Government depend on our maintaining good relations—on a fair basis—with our allies and major trading partners. The American corporation that must rely upon imports from abroad or on exports to foreign nations cannot afford the substantial disruption of commercial relations that can result from such conflicts. A good example is the result difficulties that arose concerning the antitrust proceedings involving the air transportation industry on the North Atlantic. At one point the conflict was so great that airlines—including U.S. airlines—were threatened with the prospect of the British Government's blocking new, low air fares from going into effect. Such actions can hardly be seen as benefiting American business or consumers.

The U.S. corporation doing business abroad must also have some reassurance that it will not become caught in between the sometimes inconsistent regulatory responsibilities of governments. Even if a foreign government does not affirmatively require a U.S. corporation to do business in a way that could pose antitrust problems, the foreign government may well condone and encourage cooperative practices among competitors that the U.S. corporation ignores at its own business peril in the foreign market.

The legislation I am introducing today takes a first step toward minimizing conflicts in international antitrust without giving up the United States' right and duty in appropriate cases to deter and punish anticompetitive conduct that substantially jeopardizes its interests. I have consulted with various representatives of government, industry, the academia, and the bar both here and abroad concerning my proposals. These individuals have included such eminent experts as Nicholas deB. Katzenbach, former U.S. Attorney General and present general counsel of IBM; Warren Christopher, former Deputy Secretary of State and present partner in the law firm of O'Melveny & Myers; Dr. Claus-Dieter Ehlermann head of legal service of the Commission of the European Communities; and Donald F. Turner, former Assistant Attorney General for Antitrust and present counsel to the law firm of Wilmer, Cutler & Pickering. All have concurred that some steps such as these are badly needed in order to take a first step toward more stable, coherent international trading relations.

Proposals such as these have been discussed for some time, both within the executive branch and in the Congress. I note, for example, that in the excellent report in the treble damage remedy prepared by Mr. Rodino's committee in the House last year there were recommendations made for reform of antitrust treble damages in three areas: One, liability of municipalities; two, research and development joint ventures; and three, international antitrust cases. Since that time, Congress has taken effective action on the first two topics; the time has come for effective action on the third.

In April 1983, Deputy Secretary of State Kenneth Dam stated that the executive branch was considering proposals to address the problems arising in the international context from private damage actions. No such proposals have been forwarded to the Congress, however.

The legislation consists of four principal sections, all of them directed toward private antitrust lawsuits, not governmental enforcement actions. I believe that the Department of Justice has shown itself to be sensitive to the foreign policy implications of antitrust enforcement and has moderated its enforcement activity accordingly. Private antitrust plaintiffs, not surprisingly, have demonstrated no such restraint.

First, my legislation provides that the standard for a U.S. court's asserting subject matter jurisdiction over an international antitrust case would be applied at least as a preliminary matter at an early stage in the proceeding. In 1982 Congress revised the antitrust laws to provide that those laws would not apply to conduct in foreign commerce unless the challenged action had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. This is a necessary minimal protection against application of U.S. antitrust laws to transactions of no real interest or concern to the United States. Under the current law, however, it is as a practical matter often quite difficult for the defendant to an antitrust action to bring an effective challenge to subject matter jurisdiction until after discovery in the action, has been substantially completed. Much of the damage to international relations, however, is often done by this late stage in the proceeding. The legislation I propose, therefore, would require U.S. courts to consider challenges to subject matter jurisdiction early in the proceeding.

Second, the legislation would provide that U.S. courts must upon request weigh the U.S. interests involved in the antitrust proceeding against those of the foreign nations involved and dismiss the action if the latter interests are stronger. This is to a large degree a codification of the approach certain U.S. courts have taken to the problem of "comity among nations" in international antitrust cases. Recent decisions of other U.S. courts, however, have cast doubt upon this approach and Congress should resolve the ambiguity promptly in order to minimize the conflicts I have described above.

Third, the legislation would provide that the common law doctrine of forum non conveniens would apply in antitrust cases. This doctrine, which generally provides that one court will dismiss a case that should be tried in another, more convenient and appropriate forum, is universally applied in cases under a variety of Federal laws. Recent decisions of certain courts, however, have suggested that the doctrine is inappropriate in antitrust cases because of a special solicitude for antitrust principles in the United States. Although the importance of competition in the United States cannot be overstated, we must recognize that some of our trading partners are similarly concerned with free markets and have laws that—while not identical in all respects with our antitrust laws—promote more substantially the same interests. Where this is the case and where a particular dispute plainly has more connections with a foreign forum than with the United States, courts should be free to apply the doctrine of forum non conveniens to send the case to its proper location for decision.

Finally, the legislation would provide that, in those cases where there is subject matter jurisdiction, where U.S. interests predominate, and where the United States is the most appropriate forum, the U.S. court can rule that the action should go forward as one for single, rather than treble, damages, where doing so will substantially ameliorate any conflict with the interests of a foreign nation. One of the aspects of U.S. antitrust law that our foreign partners find most objectionable is our imposition of treble damages. To our minds such multiple damages may be appropriate to encourage the bringing of actions or to punish wrongdoers; to other governments, however, it is an abhorrent delegation of criminal prosecutory authority to private litigants without any effective check on how it is exercised. We should recognize that in some circumstances the best way to minimize destructive conflicts while preserving our interests in vigorous competition laws may be to take the middle road between dismissing the action altogether and letting it go forward for treble damages: Courts should be free to proceed, but for the lesser, single damages.

Mr. President, I ask that the text of the bill be printed at this point in the RECORD, together with a legal analysis of the bill's provisions.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 397

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Foreign Trade Antitrust Improvement Act of 1985".

SEC. 2. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by—

(1) inserting "(a)" before "This Act"; and

(2) adding at the end thereof the following new paragraph:

"(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made in any action under the antitrust laws, it shall be the duty of the judge designated to hear and determine the case to hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.".

SEC. 3. The Clayton Act (15 U.S.C. et seq.) is amended by adding after section 20 the following new section:

"INTERNATIONAL COMMERCE

"SEC. 21. (a) Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the court shall enter a judgment dismissing such action whenever it determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action. Upon a requested by the court, the Attorney General shall appear to set forth the views of the United States as to the effects of the action on the interests of the United States and on any affected foreign nation.

"(b) Whenever a motion to dismiss for interference with foreign national interests is made under this section in any action under the antitrust laws, it shall be the duty of the court, after discovery or other proceedings directly related to the motion as the court deems appropriate, to hear and determine such motion before conducting or permitting the parties to conduct any further proceedings in the action.".

SEC. 4. Section 12 of the Clayton Act is amended by—

(1) inserting "(a)" before "That suit"; and

(2) adding at the end thereof the following:

"(b) The doctrine of *forum non conveniens* shall be applicable in any suit, action, or proceeding under the antitrust laws that involves trade or commerce with a foreign nation, and nothing contained in this section or any other venue provision applicable to such suits, actions, or proceedings shall be construed to prevent dismissal of such suits, actions, or proceedings on the ground of *forum non conveniens*.".

SEC. 5. The Clayton Act is amended by adding after section 4H the following:

"FOREIGN TRADE

"SEC. 4I. (a) Notwithstanding sections 4 and 4C, and in lieu of the relief specified in such sections, and notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person or State entitled to recovery on a claim under such section or provision shall recover (1) the actual damages sustained by such person or, in the case of a claim under section 4C, the total damage as described in subsection (a)(1) of such section, (2) interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages or total damage as specified in subsection (d) of section 4 of the National Cooperative Research Act of 1984 (15 U.S.C. 4303(d)), and (3) the cost of suit attributable to such claim, including a reasonable attorney's fee, if—

"(A) such claim results from conduct occurring in the course of trade or commerce with a foreign nation,

"(B) such claim is determined by the court to affect adversely and substantially the interests of a foreign nation, and

"(C) the court determines that the adverse effect of the claim on the interests of a foreign nation would be substantially reduced if the claim were limited to actual damages or total damages as provided herein.

Upon a request by the court, the Attorney General shall appear to set forth the views of the United States as to the effects of the claim and of the possible limitation of damages authorized herein on the interests of foreign nations.

"(b) Whenever a motion to limit damages as provided in this section is made in any action under the antitrust laws, it shall be the duty of the court to hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.".

SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 sets out the short title of the legislation: The Foreign Trade Antitrust Improvement Act of 1985. The title reflects the purpose of the legislation to rationalize further the application of U.S. antitrust law to U.S. foreign trade by supplementing the provisions of the 1982 Foreign Trade Antitrust Improvements Act (Pub. L. No. 97-290, §§ 401-03, 96 Stat. 1246).

SECTION 2

Section 2 of the Foreign Trade Antitrust Improvement Act of 1985 clarifies the procedure by which subject matter jurisdiction is to be tested in antitrust actions involving commerce with foreign nations. As originally enacted, the Sherman Act applied to actions affecting "trade or commerce among the several States." (Similarly, both the Clayton Act and the FTC Act define "commerce" to include "commerce . . . with foreign nations.") Consistent with this broad language, United States courts have interpreted the antitrust laws to apply to all conduct, wherever it occurs, that has an effect on trade or commerce either within the United States or between the United States and foreign nations. In 1982, the Sherman and FTC Acts were amended to specify that their substantive restrictions would apply only to conduct that has a "direct, substantial, and reasonably foreseeable effect on domestic United States commerce, on United States import commerce, or on the export commerce of a United States person." *See* Pub. L. No. 97-290, §§ 401-03, 96 Stat. 1246.

Section 2 works no substantive change in the 1982 Act's provisions concerning antitrust subject matter jurisdiction. Instead, it is directed to the procedural difficulties that arise in attempting to give this language its intended effect. Defendants in antitrust actions often find that the courts are reluctant to consider whether they have subject matter jurisdiction over a dispute until after the parties have largely completed their discovery of facts from one another and from third parties.

Such delay in the consideration of whether subject matter jurisdiction exists is particularly objectionable in antitrust cases involving foreign commerce. Several of the United States' most important trading partners object to any assertion of jurisdiction based merely on the effects of the challenged conduct (rather than on the location of such conduct or the nationality of the actors). Although the 1982 revisions to the subject matter jurisdiction provisions of the antitrust laws could serve to ameliorate tensions with these trading parties by at least eliminating those cases where the effects on the U.S. are attenuated, such amelioration is stifled by the practical inability of the parties to bring the matter before the court for early resolution. Moreover, even those trading partners who do not object to assertion of "effects" jurisdiction as such may nevertheless object to the intrusions of prolonged United States antitrust litigation, particularly those intrusions arising from our unparalleled provisions for wide-ranging pre-trial discovery. There is little point in permitting such frictions to develop when they could be avoided or reduced by an early determination of subject matter jurisdiction.

SECTION 3

Section 3 of the Foreign Trade Antitrust Improvements Act is intended to codify, and improve the operation of, the "jurisdictional rule of reason" in private antitrust actions involving commerce with foreign nations. This rule provides, in essence, that U.S. courts will not exercise jurisdiction over antitrust actions where the governmental interests of foreign nations would be adversely affected and where the U.S. antitrust interest is not sufficient to justify the injury to the foreign national interest. The jurisdiction rule of reason was first adopted by the U.S. Court of Appeals for the Ninth Circuit in 1976 in the leading case of *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597.

Prior to the *Timberlane* decision, U.S. courts would exercise jurisdiction over antitrust claims involving foreign conduct whenever the conduct had substantial effects on U.S. commerce. In *Timberlane*, however, the court ruled that even though U.S. antitrust jurisdiction might be present based on effects, that jurisdiction should only be exercised "base[d] * * * on * * * a decision that the United States is the nation primarily interested in the activity causing the effect." 549 F.2d at 611. Under *Timberlane*, "[i]t is * * * the relative involvement and concern of each state with the suit at hand that is to be evaluated in determining whether extraterritorial jurisdiction should be exercised by American courts as a matter of comity and fairness." 549 F.2d at 615 n.35. The decision is based upon the realization that "at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." 549 F.2d at 609.

The *Timberlane* decision has been followed by several other U.S. courts and has been widely praised by scholars, jurists and government officials both in the United States and in the nations that are our principal trading partners. It has also met with some criticism, however, and most recently these criticisms were collected in a decision of the U.S. Court of Appeals for the District of Columbia Circuit attacking the jurisdictional rule of reason and threatening its further development by the courts. *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. March 6, 1984).

The criticisms of the *Timberlane* jurisdictional rule of reason are basically of three kinds: (1) It is said that the factors enumerated by the *Timberlane* court and other authorities for balancing U.S. and foreign interests are not all useful for that purpose (for example, the "nationality of the parties," which is one of the factors to be considered, may be difficult to determine in the case of corporations and in any event may not be helpful in determining which nation is most affected by the parties' business conduct). (2) It is said that balancing national interests is a task for which courts are not well suited, and the political branches should have the primary responsibility for accommodating U.S. antitrust enforcement with the national interests of our trading partners. (3) Finally, it is stated that the jurisdictional rule of reason is not a rule of international law and that, absent statutory direction from Congress and the President, U.S. courts should not try to follow the rule.

It is the purpose of this section of the Foreign Trade Antitrust Improvements Act to respond to these criticisms and establish the jurisdictional rule of reason as the rule of decision in private U.S. antitrust cases involving trade or commerce with foreign nations. The criticisms are dealt with in the order stated above.

(1) The various factors that the courts should take into account in balancing U.S. and foreign governmental interests in an international antitrust case have been enumerated in differing ways by the courts and by other authorities such as the Restatement of the Foreign Relations Law of the United States. Obviously some of the factors in the different lists will be more helpful or less helpful than others in arriving at the reasonable jurisdictional result in a particular case. What factors are to be considered and what weight is to be given to them are for the courts to decide on a case-by-case basis. In codifying the jurisdictional rule of reason, the legislation does not therefore codify any particular list of factors or assign priorities to particular factors. Instead, it simply rests on the finding that the kinds of factors enumerated in the leading decisions and the authoritative commentaries can properly and usefully be considered by antitrust courts in balancing U.S. and foreign interests.

(2) The most serious criticism of the jurisdictional rule of reason is the claim that the balancing of national interests is too "political" for the courts. There are two responses: (a) in most cases, "political" considerations will play little if any role in the balancing judgment (as is demonstrated in the recent decision of the district court in *Timberlane* applying the jurisdictional rule of reason to dismiss an antitrust suit involving an alleged conspiracy to monopolize the Honduran lumber industry and interfere with the export of certain kinds of lumber to the United States. *Timberlane Lumber Co. v. Bank of America National Trust*, 1984-1 Trade Cas. (CCH) ¶ 65,773 (N.D. Cal. 1983), *aff'd* 1985-1 Trade Cas. ¶ 66,332 (9th Cir., Dec. 27, 1984); and (b) where political considerations are important (or where other information is needed from sources other than the parties themselves), this Section provides that the court may ask the Executive Branch to express its views for the assistance of the court. The Executive Branch can be expected to have consulted with affected foreign nations before expressing its views on the relative importance of U.S. and foreign interests. Foreign nations would remain free, as at present, to submit their views directly to the court, although in practice U.S. courts would probably follow the guidance of the Executive Branch should there be any conflict between the U.S. and the foreign nation in their assessments of the relative importance of the U.S. and foreign governmental interests.

(3) The core concern of the jurisdictional rule of reason—that a nation should not interfere with the interests of its trading partners through application of its competition law unless its greater national interest justifies it in doing so—*is* a principle of international law that can be derived from a fair examination of state practice in recent years. A leading European scholar has recently published an analysis of international antitrust practice in the U.S. and Europe over the past four decades in which he concludes that an accepted principle of international law is that "a state is prohibited from taking measures of antitrust law if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by those measures." Meessen, *Antitrust Jurisdiction Under Customary International Law*, 78 Am. J. Int'l L. 783, 804 (1984). This principle is simply a matter of comity and common sense among nations engaged in mutually beneficial trade, and the United States will benefit if we adhere to this principle by moderating the exercise of our antitrust jurisdiction pursuant to the jurisdictional rule of reason enacted in this Section.

As with the existence of antitrust subject matter jurisdiction based on effects on U.S. markets, discussed above, the possibility that an antitrust action will adversely affect other nations' important interests should normally be considered by the court at an early stage of the litigation, to avoid the damage to foreign interests and U.S. foreign relations that can be caused by the pendency of the suit itself. As Section 2 does with the issue of subject matter jurisdiction, subsection (b) of this section provides for prompt decision under the jurisdictional rule of reason.

This section does not provide for the application of the jurisdictional rule of reason to antitrust actions brought by the Department of Justice or the Federal Trade Commission. Most knowledgeable observers are satisfied that the usual practice of the enforcement authorities of both these agencies is to take foreign interests adequately into account in determining whether and whom to investigate or sue and what relief to request. Where prosecutorial zeal threatens foreign interests and damages U.S. foreign relations, the President can remedy the situation, as he recently did in the North Atlantic air transport investigation.

SECTION 4

Section 4 of the Foreign Trade Antitrust Improvements Act is intended to remove any uncertainty that the well-established doctrine of *forum non conveniens*, as expounded and applied by the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), is applicable to antitrust suits involving trade or commerce with foreign nations. Under this doctrine, a court may decline jurisdiction over a lawsuit, and send the plaintiff to an alternative forum, including a foreign forum, where trial of the lawsuit in the other forum would better serve the overall convenience of the parties and the courts and would be in the interests of justice.

After the Supreme Court decided in 1948 that the doctrine of *forum non conveniens* was not applicable to antitrust suits brought in a judicial district in which venue was proper under Section 12 of the Clayton Act (*United States v. National City Lines I*, 334 U.S. 573 (1948)), Congress enacted 28 U.S.C. § 1404(a) providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In *National City Lines II*, 337 U.S. 78 (1949), the Supreme Court held that this enactment made *forum non conveniens* principles applicable to antitrust actions, notwithstanding Section 12 of the Clayton Act.

Section 1404(a), however, applies the doctrine of *forum non conveniens* only where the more convenient alternative forum is another U.S. district court. Thus it was possible for a Court of Appeals to decide in 1982, notwithstanding *Piper Aircraft Co. v. Reyno*, that *National City Lines I* is controlling, and *forum non conveniens* is not a ground for dismissing an antitrust suit, where the more convenient alternative forum is a *foreign* court. *Industrial Investment Development Corp. v. Mitsui Co.*, 671 F.2d 876 (5th Cir. 1982) vacated on other grounds, 103 S. Ct. 1244 (1983). This decision has since been followed by at least one other lower court. *Laker Airways Ltd. v. Pan American Airways*, 568 F. Supp. 811 (D.D.C. 1983).

For fifty years, the doctrine of *forum non conveniens* has been fully applicable to the whole range of federal statutory actions (except antitrust), such as actions under the Lanham Act, Jones Act and Securities Exchange Act, as well as to admiralty, diversity and even constitutional claims. It is thus anomalous that in the field of foreign commerce only antitrust actions must be retained in U.S. courts even when convenience and justice would dictate that the plaintiff be remitted to the court of another nation. U.S. courts should not be prevented from closing their doors to forum-shopping foreign antitrust plaintiffs or, more generally, from requiring all antitrust plaintiffs, foreign and domestic, to litigate their claims in the forum that is, according to settled legal principles, the most appropriate one in which to try the case.

Because courts normally consider the question of *forum non conveniens* at any early stage of any lawsuit in which the issue is raised, Section 4 contains no provision parallel to Sections 2, 3(b), or 5(b) of the Act.

SECTION 5

Section 5 of the Foreign Trade Antitrust Improvements Act limits the recovery of antitrust plaintiffs to actual damages, interest, and litigation costs in cases involving trade or commerce with a foreign nation where the claim asserted would, if upheld, have a substantial adverse effect on the interests of a foreign nation. In recent years various business transactions touching more than one nation's interests have given rise to challenges under the United States antitrust laws. These have included the notorious cases involving the shipping, airline and uranium industries, as well as a wide variety of other cases. Frequently these disputes have deeply troubled United States allies and trading partners because the strictly applied U.S. antitrust laws are at odds with the form of business transactions encouraged by other nations. For example, while the United States was vigorously pursuing criminal and civil antitrust remedies against United States and European shipping companies in the late 1970s, several European countries were expressing their strong views that the shipping conferences being challenged had been determined by those nations to be in their best interests.

One of the aspects of United States antitrust enforcement that is most objectionable to our trading partners is what the British refer to as the "rogue elephant" of treble damages. Our allies view the treble damage provisions in the Clayton Act as making our laws promoting competition into criminal laws enforceable by private parties and their lawyers without prior review or approval by any court or government official. This is a practice largely unknown in other Western nations and makes the inevitable interference of United States competition laws with business transactions abroad particularly odious to other nations.

Until now, United States courts have had only two alternatives in dealing with conflicts between United States antitrust laws and the interests of foreign nations: Courts can either stop the action altogether (by imposing requirements such as the 1982 subject matter jurisdiction test or the jurisdictional rule of reason), or they can permit the action to go forward without limitation. Sections 2, 3, and 4 of the Foreign Trade Antitrust Improvements Act enhance the courts' ability to use the tools of subject matter jurisdiction, the jurisdictional rule of reason, and *forum non conveniens*, respectively, to pursue the former course. Section 5 provides an additional, new alternative available in cases where the court determines that, despite the substantial adverse effect on the interests of a foreign nation, on balance the action should nevertheless go forward. In such cases the degree of conflict with the adversely affected foreign nation often can be substantially ameliorated by the court's limiting recovery in the action to single, compensatory damages alone. Section 5 provides the necessary authority.

Subsection (b) once again provides for prompt resolution of an issue that may reduce the injury to U.S. trading relations that would otherwise result from a private antitrust action.

Opening Statement of Chairman Strom Thurmond

Our hearing today is on a bill introduced by our distinguished colleague, Senator DeConcini. The bill, S. 397, would make a number of reforms in private antitrust enforcement. The thrust of the bill would be to ensure that foreign interests adversely affected by private antitrust suits are acknowledged by the courts and balanced against the interests of the plaintiffs.

The antitrust laws of the United States were enacted for the benefit of U.S. citizens—to protect those citizens from the effects of anticompetitive conduct. It is possible for the acts of foreign citizens in their own countries to be subject to U.S. antitrust laws, so long as that conduct has the requisite effect on U.S. commerce. This possibility has, from time to time, caused serious friction between the U.S. and foreign governments.

The concern addressed by Senator DeConcini's bill is that a private antitrust suit which threatens an extraterritorial application of U.S. law may work to the ultimate detriment of U.S. foreign relations and the ability of U.S. firms to do business abroad.

The bill proposes to deal with this problem in several ways:

(1) It would explicitly recognize that foreign interests may be adversely affected by private U.S. antitrust suits and the extraterritorial application of U.S. laws;

(2) It would provide that appropriate weight be given to foreign interests in such suits;

(3) It would require intervention by the Attorney General in private suits for the purpose of articulating to the courts the effects of antitrust claims on foreign interests;

(4) It would provide for early dismissal of suits in which the adverse effect on foreign interests outweighs the plaintiff's interest in prosecuting the antitrust claim; and,

(5) It would permit damages to be limited to actual damages where the adverse effects on foreign interests would be reduced if treble damages were not awarded.

While the bill deals directly with some troublesome features of private enforcement of U.S. antitrust law, it also raises some difficult questions. In these hearings, the Committee should explore: (1) the potential for policy conflicts between the State Department and the Justice Department; (2) the potential for conflicts within the Department of Justice; (3) the ability of our Federal judges to evaluate and balance the foreign interests to be articulated by the Justice Department; (4) the potential problems in allowing the courts to require the Attorney General's participation in suits, and ultimately; (5) the extent to which private enforcement of U.S. antitrust laws might be subordinated to other policies of the United States or foreign nations.

To begin the inquiry, we have a distinguished group of witnesses from the Administration (including a former Federal judge), the private bar, and the American Bar Association.

Senator DeConcini. We will proceed now with Judge Abraham Sofaer and Charles Rule of the Justice Department.

Judge.

Judge Sofaer. Senator, I am deferring to Mr. Rule. I feel that the Antitrust Division has the lead in domestic legislation in this hearing.

Senator DeConcini. All right, Judge, thank you very much. Do you care, then, not to testify?

Judge Sofaer. I will testify after Mr. Rule.

Senator DeConcini. All right. Why don't you join him at the table, and for time's sake, we will move right along and consider you together here.

Mr. Rule, thank you for being with us once again. We appreciate the time and effort that you have consistently put in in answering and responding to the committee's requests of the Justice Department.

STATEMENT OF A PANEL INCLUDING: HON. CHARLES F. RULE, ACTING ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE; AND JUDGE ABRAHAM SOFAER, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. Rule. Thank you, Senator. I appreciate those kind words.

It is a pleasure to be here today to present the views of the Department of Justice concerning your bill, S. 397. We believe this bill is a thoughtful attempt to deal with some of the problems that may arise in application of our antitrust laws to conduct that is in some way foreign.

The Department of Justice believes the bill is a good starting point for serious consideration of these issues. Nevertheless, for the reasons set out in some detail in my prepared statement, the Department cannot support the bill's enactment. As I understand it, the members of the committee have a copy of that statement, and I would ask that it be placed in the record, and I will simply summarize those remarks today.

Senator DeConcini. Without objection, it will appear in the record in full, and you may summarize.

Thank you.

Mr. Rule. Thank you, Senator.

Let me first stress that we at the Department are aware of the harm that blind application of the antitrust laws, insensitive to the interests of foreign nations, can do to our relationships with our trading partners. The harm may outweigh the benefits in the particular cases, and there is no doubt about that.

Accordingly, we at the Department of Justice have long taken foreign interests and factors of comity into account in exercising our prosecutorial discretion in cases involving foreign conduct in which foreign governments have an interest.

Private parties, on the other hand, because they are interested in seeking redress and, quite understandably, do not view themselves as agents of the Government's foreign policy, rarely take foreign interests into account in bringing a suit. And it is this fact, the private party suits, that has raised the concern and that your bill, Senator, addresses directly.

We applaud S. 397's attempts to address this problem, and generally, we do not object to the bill's requirements that the courts decide jurisdictional issues early and that the courts apply the forum non conveniens doctrine to antitrust cases. One can debate the practical effect of those clauses, but we certainly have no objection to the intent that lies behind them.

We do, however, have serious concerns with the bill's other two provisions. First, the Department must object to the codification of the jurisdictional rule of reason, as laid out in the bill, for several reasons.

Most importantly, we believe, in addition to other things, that it would invite the courts to engage in foreign relations and to balance the essentially political interests of foreign governments against those of our own Government. It would create, we believe, a great deal of uncertainty as to when the antitrust laws will be applied and what distinctions will be made concerning conduct involving foreign countries.

It simply, in our opinion, requires the judicial branch to perform some functions that they are ill-equipped to handle and that, under our scheme of separation of powers, are more appropriately assigned to the executive branch.

Second, the Department must object to the bill's detrebling provisions. Again, we understand the concern underlying those provisions. However, because the provision is discretionary with the courts, we again believe it is subject to the same criticisms that we have of the jurisdictional rule of reason.

There are other objections, as well, including the fact that foreign nationals are likely to be the primary beneficiaries of this provision, giving them a competitive advantage over their American counterparts at a most inopportune time in our balance of trade situation.

We believe this committee should defer action on detrebling until the Georgetown study that is currently under way on treble damages is complete, and the question of detrebling of foreign antitrust matters can be considered in the context of more comprehensive detrebling.

In sum, Senator, while we support the underlying objectives of the bill to reduce the tensions with our allies created by unrestrained private treble damage actions, we cannot support the specific way in which this bill seeks to achieve those objectives.

Thank you, and I will be happy to answer any questions.

Senator DeConcini. Thank you, Mr. Rule.

[Statement and responses to written questions of Senator Thurmond follow:]

STATEMENT OF

CHARLES F. RULE
ACTING ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING S. 397,

"THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985"

ON

JUNE 21, 1985

Mr. Chairman and Members of the Committee:

It is a pleasure to be here today to provide the views of the Department of Justice concerning S. 397, the "Foreign Trade Antitrust Improvements Act of 1985." This bill is a thoughtful attempt to deal with some of the problems that may arise in application of our antitrust laws to conduct that is in some way "foreign." The Department of Justice believes the bill is a good starting point for serious consideration of these issues. Nevertheless, for the reasons I will explain this morning, we cannot support its enactment.

The antitrust laws are essential to the proper functioning of the free enterprise system on which this nation depends. The invisible hand of the marketplace, free from unnecessary private and governmental interference, can be counted on to serve the interests of consumers and producers alike. Economic liberty goes hand-in-hand with political liberties. Moreover, free markets yield the range of products and services consumers most desire and give businesses the correct incentive to put scarce resources to their most productive use. Our free market system also spurs economic growth and technological innovation by rewarding those individuals who devise and produce "new and better mousetraps." By preserving the ability of market forces to work their will, free of unwarranted restraints, the antitrust laws contribute importantly to our nation's welfare.

In order to be effective, the antitrust laws must be able to reach some foreign conduct--for example, an international cartel of private producers must not be able to inflict its higher prices on United States consumers with impunity just by holding its meetings abroad. Thus, the Sherman Act by its terms reaches anticompetitive restraints in the foreign as well as the domestic commerce of the United States. Over the years differing interpretations of the circumstances in which those laws apply to foreign conduct have evolved. The courts have, however, consistently recognized that the antitrust laws' purpose of protecting competition in our markets cannot be achieved without reaching foreign as well as domestic conduct. 1/ As our economy becomes more interdependent with the economies of other nations, the importance of this principle in protecting our economy increases. At the same time, the likelihood that application of our antitrust laws may lead to conflicts with our trading partners grows correspondingly. In an interdependent economic world, the prospect that conduct will be subject to scrutiny by more than one nation is substantial. Furthermore, as interdependence increases, any line dividing "foreign" and "domestic" commerce becomes increasingly blurred.

While they do not arise frequently, conflicts with our trading partners arising from the application of our antitrust laws to foreign commerce may impose significant costs. They

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1/ United States v. Aluminum Co. of America ("Alcoa"), 148 F.2d 416 (2d Cir. 1945).

may harm our foreign relations beyond the particular case at issue. They have created hostility to American antitrust enforcement, even among those who share our basic competition goals. Hostility has lead to retaliatory responses--such as "blocking" and "claw back" legislation--that may affect our ability to enforce our antitrust laws. Unnecessary international acrimony over competition policy benefits no one.

S. 397 represents a serious attempt to deal with the important problem of how the United States antitrust laws should deal with private antitrust litigation that arises out of disputes involving United States international trade. It would address the problems I have identified with four substantive provisions. First, the bill would require courts hearing private antitrust claims involving foreign commerce to resolve the issue of subject matter jurisdiction at an early stage of the proceeding.

Second, the bill would require a court to dismiss a private antitrust suit challenging foreign or transnational conduct if the court concluded that the interests of a foreign nation predominated over those of the United States. In effect, this provision would codify the jurisdictional "balancing test" adopted by a number of federal appeals courts--although rejected by others--during the last decade. 2/ If requested by

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2/ *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 614 (9th Cir. 1976)(balancing test applied); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287,

Footnote Continued

the court, the Attorney General would be required to give the government's views as to the effect of the suit on the interests of the United States and of any affected foreign government. The ultimate decision, however, would be left entirely to the courts.

Third, the bill would allow the courts to apply the doctrine of _forum_ _non_ _conveniens_ to antitrust cases involving foreign commerce. Some courts have refused to apply the doctrine in antitrust cases. 3/ This refusal is contrary to the doctrine's application in almost all other areas of substantive federal law.

Fourth, the bill would require the courts to award single, rather than treble, damages if it appeared that such "detrebling" would substantially reduce any adverse impact of the suits on a foreign nation's interest. Again, if requested, the Attorney General would be required to provide the view of the Executive Branch.

2/ Footnote Continued

1297-98 (3d Cir. 1979)(balancing test applied). _But_ _see_ In Re Uranium Antitrust Litigation, 617 F.2d 1248, 1254-56 (7th Cir. 1980)(balancing test rejected). _See_ _generally_ Restatement (Second) of the Foreign Relations Law of the United States § 40 (1965); Restatement (Revised) of the Foreign Relations Law of the United States §§ 402, 403 (Tent. Draft No. 2, 1981).

3/ Industrial Investment Development Corp. v. Mitsui Co., 671 F.2d 876 (5th Cir. 1982), _vacated_ _on_ _other_ _grounds_, 460 U.S. 1007 (1983); _see_ _also_ El Cid, Ltd. v. New Jersey Zinc Co., 444 F. Supp. 845, 846 n.1 (S.D.N.Y. 1977); _but_ _see_ Laker Airways, Ltd. v. Pan American World Airways, 568 F. Supp. 811 (D.D.C. 1983).

S. 397 reflects a thoughtful effort to deal with a difficult set of cases. It endeavors to minimize foreign relations frictions arising out of private antitrust suits that have international implications by reducing the threat of treble damages. 4/ It seeks to eliminate costly delay and enhance efficiency by providing for the early resolution of jurisdictional questions. It seeks to promote fairness and reduce uncertainty by recognizing the principle of forum non conveniens and by specifying the situations in which a court must dismiss private antitrust suits affecting foreign commerce. In short, S. 397 very commendably attempts to devise solutions to the problems arising out of private antitrust lawsuits that implicate United States and foreign interests. For the reasons I will set out this morning, however, the Department of Justice cannot support the bill.

4/ The most serious foreign relations strains from enforcement of American antitrust laws arise from private treble damage suits, not from government enforcement actions. As the bill's sponsor, Senator DeConcini, has recognized, the Executive Branch already carefully evaluates comity and foreign relations considerations in relevant enforcement matters. Most of our trading partners acknowledge that the Department of Justice and the Federal Trade Commission do a fairly good job of taking legitimate foreign interests into account in cases with international aspects. Private plaintiffs, however, have a different, and narrower, set of motivations and interests than do government antitrust agencies. Thus, private plaintiffs may initiate cases even if, in an ultimate reckoning of relative United States and foreign interests, those cases should not be brought. Moreover, our trading partners judicial systems' do not authorize private treble damage antitrust suits. Accordingly, our trading partners find it hard to accept that they should be subject to the costs and risks associated with private treble damages antitrust litigation.

Let me briefly discuss the provisions that would require courts to expedite consideration of jurisdictional issues, and that would make the forum non conveniens doctrine applicable in these cases. Although we support the intent of both of these provisions, we do not believe that they are likely to have a very significant practical effect. Early decisions on jurisdiction would help to minimize conflicts caused by those cases in which the United States has the fewest legitimate interests and foreign governments the most. It is important to recognize, however, that jurisdictional issues may be difficult to resolve at the beginning of cases in which the same facts, or closely intertwined facts, may go both to the merits and to jurisdiction. Substantial discovery may be necessary to resolve many of the issues. Thus, we suspect it has been as much the nature of the issues presented as any disinclination on the courts' part to dispose of litigation on jurisdictional grounds that has protracted some of the more contentious international cases.

We also support, in principle, the extension of the forum non conveniens doctrine to antitrust cases that involve foreign commerce. We see no reason why the courts should consider themselves entirely foreclosed from concluding, in appropriate cases, that a foreign court would be a preferable forum for litigating the claims asserted in a U.S. antitrust case, consistent with the standards set out in the Supreme Court's

1981 decision in Piper v. Reyno. 5/ It must be recognized, however, that foreign courts may be unavailable for, or unhospitable to, private causes of action of the kind represented by U.S. antitrust litigation. The Supreme Court has made it clear that dismissal on the ground of forum non conveniens should not be denied because the foreign forum's law is less advantageous than U.S. law. The Court also has stressed, however, that if a foreign tribunal provides a "clearly inadequate" remedy, a district court may conclude that dismissal would not be in the interests of justice. 6/ We assume that the forum non conveniens provisions of S. 397, if enacted, would be interpreted consistent with this limitation, as well as other aspects of the Supreme Court's Piper v. Reyno decision.

The other two provisions of S. 397--"jurisdictional balancing" and "detrebling"--raise more fundamental and troubling questions. They address the right problem, namely, that private antitrust treble damage actions involving international commerce can interfere with our foreign relations and, in particular circumstances, may not be consistent with United States foreign policy interests. These provisions, however, raise questions of a very basic nature about the proper roles of the Executive and Judicial Branches, as well as

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5/ Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

6/ Id. at 254.

about the balancing of United States and foreign economic interests. We do not believe S. 397's open-ended delegation to the courts of responsibility for weighing the relative importance of policies and interests of our government against those of other governments is the proper legislative response to the foreign policy concerns arising out of private antitrust litigation.

Beginning with the Ninth Circuit Court of Appeals' 1976 Timberlane decision, 7/ a number of courts have adopted--at least in principle--an "interest balancing" approach to resolve competing U.S. and foreign interests implicated in private antitrust suits with international ramifications. Under this approach, a variety of factors are to be examined by the court in deciding whether jurisdiction should be asserted or whether, conversely, foreign interests in the subject matter of the suit so predominate that U.S. antitrust jurisdiction should not be exercised. This balancing exercise may encompass factors ranging from concrete and readily ascertainable ones, such as the nationality of the parties, to such complex and political considerations as the impact of the litigation on the foreign relations of the United States. While the consideration of factors that are specific to the particular facts and parties of a case and that do not involve essentially political issues is

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7/ Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

unobjectionable, the courts' exercise of foreign policy decisionmaking is very troublesome.

A number of thoughtful commentators--ranging from foreign governments to some of our own courts--have criticized this judicial balancing approach as delegating to the courts a role they are inherently ill-equipped to perform. 8/ They point out that institutional limitations on the judicial process make it impossible for a court to determine objectively whether foreign interests outweigh the United States interests implicated in litigation. Moreover, they argue that because the Constitution grants the Executive Branch sole responsibility for conducting our foreign relations, separation of powers considerations indicate that the Executive Branch should make the political and foreign policy judgments required to balance the American and foreign government interests in a particular case.

We fully agree with these commentators. In some--one would hope rare--instances, the balancing that is appropriate to an antitrust case may involve sensitive political issues that have little or nothing to do with the facts of a particular controversy. Moreover, under a jurisdictional balancing approach, there will be situations in which United States and foreign interests will simply be at loggerheads. Instructing a court to consider both interests will not provide a ready solution in such cases.

8/ See, e.g., Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 948-55 (D.C. Cir. 1984); In Re Uranium Litigation, 480 F. Supp. 1128, 1148 (N.D. Ill. 1978).

We believe Judge Wilkey's thoughtful opinion in the private Laker litigation 9/ correctly stated that the courts are simply the wrong place, under our Constitution's allocation of responsibilities and competences, to engage in a balancing of conflicting U.S. and foreign economic policies and philosophies. Moreover, such balancing by unelected federal judges who are likely to have little experience or expertise in the area of foreign relations may exacerbate rather than alleviate tensions between the U.S. and our trading partners. The disappointment and frustration of our allies will likely be magnified if they perceive that courts are insensitive to their concerns. These problems would be compounded by legislative provisions leaving the courts free to ignore Executive Branch guidance once it is given. Thus, we believe that it would be most unwise to codify the jurisdictional balancing test, at least in the open-ended way proposed in S. 397.

We believe that the jurisdictional balancing test is actually composed of three steps--the first two could generally be performed by the judiciary, while the third should be the province of the Executive Branch. First, under existing law a court must determine whether conduct being scrutinized has "direct, substantial and reasonably foreseeable effects" on United States domestic or import commerce. Only if such effects are found should the inquiry continue. Second,

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9/ Laker Airways, Ltd. v. Sabena Belgian World Airlines, Id.

assuming the initial jurisdictional hurdle has been cleared, the court may weigh a variety of fact-specific considerations having no foreign relations or political overtones. They include the extent to which enforcement by either state can be expected to achieve compliance, the extent to which there is an explicit purpose to harm or affect American commerce, the foreseeability of such an effect, and the relative significance of effects on the United States as compared with those elsewhere. If a weighing of these factors suggests jurisdiction should not be asserted, the inquiry ceases.

It is the third step of the balancing test that allows the courts to balance the interests of the foreign nation against those of the U.S. and otherwise to consider the effect of an antitrust action on foreign relations interests. It is this potential step that the Department finds objectionable. If private treble damage actions are to be dismissed at this stage--and we recognize that such dismissals may be appropriate in extraordinary circumstances--we believe that it is the Executive, not the Judicial, Branch that should make that final determination.

Generally the first two steps should resolve most jurisdictional disputes without requiring the courts to balance political considerations. If a jurisdictional balancing test consisted solely of these two steps and if the list of factors to be balanced in step two were explicitly and inclusively spelled out to avoid any foreign relations or other political considerations, the test might be acceptable. However, to the extent the test goes beyond well-defined metes and bounds of these first two steps to consider foreign policy factors, we believe that it is the Executive Branch that should perform this final step.

I would like to address now the last provision of S. 397 that would allow courts to reduce available awards in private antitrust actions from treble to actual damages--so called, "debtrebling." A serious problem with this provision is similar to that connected with the jurisdictional balancing test. Namely, the bill would delegate to the courts the essentially political role of assessing the nature and strength of a foreign sovereign's interests in the outcome of the litigation. Under S. 397, detrebling would depend solely on the foreign interests involved. No consideration whatsoever could be given to the often substantial United States interests in preventing, deterring, or punishing the conduct at issue. Moreover, detrebling would be done on a case-by-case basis that might lead to uneven results across courts.

S. 397's detrebling provision has additional shortcomings. First, because foreign firms would be the primary (if not the only) beneficiaries of detrebling, the provision is subject to the criticism that it would provide an unfair competitive advantage to foreign firms at the expense of their American competitors. This concern is particularly acute during the current period of intensified international competition.

Second, the detrebling provision is entirely different from the approach of recently enacted detrebling measures, such as those that relate to export trade and joint research and development. Those initiatives have been based on the notion that there is a specific category of potentially desirable conduct that is "overdeterred" by the possibility of treble damages, and that conduct has been specified in legislation. In contrast, S. 397 would apply to any conduct--regardless of its potential to harm United States consumers and United States commerce--so long as the conduct involved foreign commerce. Some such conduct, such as naked price fixing and other covert cartel agreements among competitors, is unequivocally harmful and is generally appropriate for treble damages treatment.

Many antitrust commentators believe that the current rule of across-the-board, automatic treble damages may adversely affect not just foreign relations but, more importantly, the overall economic vitality and efficiency of the U.S. economy as well. The Administration looks forward to the release of the Georgetown University study on treble damages which may contribute empirical insight into whether and in what form comprehensive detrebling reform legislation is appropriate. Unless the Georgetown study unequivocally indicates that private treble damages are not deterring efficient, potentially procompetitive conduct, it may be appropriate for Congress to consider whether a comprehensive reexamination of antitrust remedies in general and treble damages specifically is necessary.

We recognize that detrebling has the potential for substantially alleviating friction with our trading partners resulting from the application of the antitrust laws. Nevertheless, for the reasons I have explained, we do not believe that S. 397 offers a desirable solution to the treble damages problem. Detrebling in foreign antitrust cases would more appropriately be considered in the context of comprehensive legislation. The use of detrebling in the context of negotiated bilateral agreements might also be considered. This approach would recognize that if we are to cede the use of important antitrust enforcement provisions in deference to a foreign government's interests, that government should reciprocate by recognizing that we, too, have important interests at stake.

In summary, S. 397 represents a timely approach to important challenges that face United States antitrust policy and provides a good starting point from which to address those challenges. Nonetheless, this measure has serious drawbacks, and we strongly counsel against its adoption. Not the least of those drawbacks is that it would solve the problems I have described by instructing our courts to make essentially political judgments in a manner that is inconsistent with the proper constitutional allocation of responsibilities within our government. Therefore, while we strongly oppose enactment of S. 397, we hope that it will provide needed impetus for developing and considering alternative approaches. We are committed to work with the Congress toward developing appropriate solutions to the serious problems that this bill addresses.

Mr. Chairman, that concludes my prepared remarks. I would be happy to respond to any questions you or other members of the Committee may have.

Responses of Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice to written questions concerning S. 397.

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1. To what extent, if any, do you think that the private interests of plaintiffs in recovering for antitrust injury would be subordinated to other interests under this bill?

This question must be answered in two parts because there are two relevant provisions of the bill that would affect the interests of plaintiffs in recovering for antitrust injury in different ways.

First, under the proposed codification of a jurisdictional "balancing test," some individual plaintiffs' cases might be dismissed, but the overall effect of the bill is unclear. Because the bill does not specify the factors that the courts must consider in determining whether to exercise jurisdiction, it is impossible to predict the circumstances, or the types of cases, in which a plaintiff's claims would be dismissed. This codification of uncertainty, of course, is one of our major problems with the bill.

Second, with respect to the detrebling provisions of the bill, a plaintiff's interest in recovering for its injury would not be considered at all by a court in deciding whether to detreble; only the foreign interests would be considered under this provision. While plaintiffs could recover their actual damages, their interest in recovering treble damages would be ignored, as would the United States' interest in the application of the treble damage remedy to deter antitrust violations of the kind alleged.

2. What potential, if any, is there for conflict between the State Department and the Justice Department, or within the Justice Department, under this bill?

The bill would require the Executive Branch to express its views, if requested by the court, on issues that could affect complex and sensitive matters of policy and foreign relations. As we have previously noted, we have serious objections to this requirement on practical, policy, and constitutional grounds. There are, however, normal and usual processes for identifying and resolving varying views within the Executive Branch, and within Executive Branch agencies. It is entirely appropriate that such a process take place within the Executive Branch, and the possibility that the Justice and State Departments initially might bring differing perspectives to a particular case is not a factor in our opposition to the bill.

3. How often do private antitrust suits threaten to affect adversely the kind of "foreign interests" referred to in this bill?

There are over one thousand private antitrust cases filed every year. Only rarely do those cases raise foreign relations problems of any significance. This fact does not, of course, minimize the seriousness of those problems when they do arise.

4. Is it appropriate for Congress to permit the detrebling of antitrust damage awards in the narrow category of cases addressed by this bill, or should any consideration of detrebling occur in a broader legislative context?

Any consideration of detrebling for foreign cases should be a part of a general examination of the treble damage remedy. We intend to conduct such an examination upon completion of the Georgetown University treble damage study. We understand that the first results of the study are expected sometime this fall.

5. I understand that there is a petition for writ of certiorari now pending in the Supreme Court in the Timberlane case. This case would enable the Supreme Court to resolve the conflict (with the Laker decision, for example) over the ability of courts to dismiss private antitrust damage actions under the jurisdictional rule of reason. Do you plan to ask the Supreme Court to grant certiorari in Timberlane and resolve this question? If not, why not?

The Supreme Court did not solicit our view on whether to grant certiorari in Timberlane. It is not the Department's usual practice to offer a view on pending certiorari petitions in private suits without having been invited to do so by the Court, although we of course do so from time to time on issues of exceptional importance. As the Committee may be aware, the Supreme Court denied certiorari in Timberlane shortly before the end of its term.

6. Section 3 of S. 397 would resolve the conflict by endorsing the jurisdictional rule of reason and making it an explicit part of the antitrust laws. If you oppose Section 3, shouldn't you also be trying to get the Timberlane decision reversed by the Supreme Court and thus get rid of the jurisdictional rule of reason?

While the Court's denial of certiorari in Timberlane has mooted the immediate question of our participation in the case, it should be noted that we do not hold the view that all of the Timberlane factors are inappropriate for judicial consideration. There are some factors, such as those traditionally considered by courts in conflict of laws analysis and those that are peculiar to the facts of a case, that would be appropriate for courts to take into account in deciding whether the challenged conduct was intend by Congress to be reached under the antitrust laws. What we object to is granting courts the discretion to make foreign policy decisions, and to the suggestion that courts should base jurisdiction on a judicial determination of the relative importance of policies and legislation of the United States as compared with those of other governments.

7. Do you plan to appear as an amicus in private treble damage cases involving international commerce and urge rejection of the jurisdictional rule of reason?

We would consider appearing if the record and the issues raised in a particular case made it an appropriate vehicle to help develop the law in the proper direction.

8. We have testimony here today that the Department of Justice has refused to appear in private antitrust actions involving international commerce to advise the court on how foreign governmental interests and the foreign policy objectives of the United States may be affected by the action. (Campbell & Westin, p. 22). Why won't the Department appear? Doesn't it feel any responsibility for helping resolve international conflicts created by private antitrust actions?

The Clerk of the Supreme Court since 1978 has requested that foreign governments file their views directly with that Court by means of *amicus* briefs rather than through the Executive Branch, as had been the prior practice. We believe that it is entirely appropriate that foreign governments speak for themselves and present their views on their interests and how they are affected by antitrust suits directly to the courts in this way.

Moreover, while there have been private antitrust cases involving foreign government interests and potential foreign policy concerns in which we have elected not to present views to the court, there have been other cases in which we have done so. For example, we very recently filed an *amicus* brief in the Supreme Court in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*. (No. 83-2004), in which we called to the Court's attention the concerns that had been expressed by a number of foreign governments as well as the adverse impact the decision below could have on the United States' conduct of its foreign relations.

9. Why have you agreed in bilateral agreements with Canada and Australia that you will appear in private actions upon the request of those governments? Why limit your willingness to appear in private actions to those two countries' requests? Why not appear if Great Britain asks you? Why not appear if a U.S. court asks you? Why not appear if a U.S. company asks you?

The provisions relating to private suits in our antitrust agreement with Australia and our Memorandum of Understanding with Canada are important aspects of those arrangements. In each instance, however, the undertaking to participate in private litigation is a limited one, and is part of a carefully negotiated and balanced package to which both parties have committed themselves. The United States' obligation in these agreements to participate in private suits relates only to suits challenging conduct that was previously the subject of notification and consultation within the framework of those agreements, and only requires us to advise the court of the substance and outcome of the consultations. Should the question arise of our expressing views on a subject, or in a suit, not covered by these provisions, we could of course choose to do so in appropriate cases. In the Canadian understanding, we expressly confirmed that we would consider the possibility of doing so if requested by the Canadian government. Of course, nothing in these agreements or in our present policy would preclude our participating in appropriate cases in an appropriate manner at the suggestion of other governments, the courts, or a U.S. company, and we would always carefully consider such requests on a case-by-case basis.

Senator **DeConcini**. Judge, do you have a statement you wish to insert in the record? If you do, I will hold my questions for the moment.

STATEMENT OF ABRAHAM SOFAER

Judge **Sofaer**. Thank you, Senator.

I am also delighted to appear before you and this distinguished committee to testify on behalf of the Department of State on S. 397. I appreciate this opportunity to present the Department's views.

I also have a written statement, which I would ask be made a part of the record.

Senator **DeConcini**. Without objection, it will be placed in the record in full.

Judge **Sofaer**. So I will spend just a couple of minutes telling you, Senator, that I think you have done a most constructive thing by starting the process of considering the difficulties that are sometimes generated in particular private antitrust litigation.

Our antitrust laws must be applied fairly and objectively within our territory, and must relate to activities of foreign concerns if they have a substantial effect that is direct and foreseeable in our territory. That is the policy of the United States. It is legislated by the Congress of the United States and applied by the Department of Justice. And we in the Department of State support that policy, and we have to start with that premise, I believe.

At the same time, in applying that fundamental policy, we have to recognize that, although the number of cases in which difficulties arise may be relatively few, the difficulties can be pronounced, and indeed, can cause problems that affect our foreign relations.

So we welcome this initiative, because it is a constructive effort to resolve these difficulties, and we support its goals.

Now, the difficulties are real, and we do spell out in our statement some of the incidents that have arisen, some of the problem areas, from the famous antitrust investigations or private litigation that has occurred in recent years. I will not bore you with details of those. But the principal objections raised by foreign concerns are that they do not like our effects test. Some of them feel that anything that they are doing within their territory should be beyond the reach of our laws. Foreign governments also sometimes permit and indeed, encourage, conduct that we regard as unlawful, and that can generate considerable problems for us.

Then, just the nature of antitrust litigation is such—and I can speak from personal experience in this regard—that we have enormous costs being generated every time one of these suits is filed, both discovery costs, attorneys' fees, and in connection with foreign governments, very real costs in terms of their national policies.

And there is a general reluctance in antitrust litigation on the part of district judges to dismiss cases because the circuit courts are very prone to reverse dismissals, particularly without extensive discovery. And then, of course, the foreign governments and foreign entities object to treble damages. They do not understand American discovery, American treble damage principles and rules.

Now, we, therefore, applaud and welcome your effort to start addressing these problems. We do object, however, and we concur with the Department of Justice in this, to the key directive on jurisdiction in the proposed legislation, which we feel is far too broad; it contains no guidelines or qualifications as to the kinds of national interests to be weighed or as to how they are to be weighed. The formulation invites the courts to make national interest and foreign relations determinations for the United States and for other countries that are political and thus properly for the executive branch under our system of Government.

Now, it may be that you in your bill are seeking to adopt an approach taken in certain litigation—the *Timberlane* case is one—that calls for a balancing, a weighing of relevant interests, a consideration of comity and other principles that we have recognized in our law. But I call to your attention that the *Timberlane* case calls for a more particularized and concrete weighing of the degree of conflict between the relevant United States and foreign law, and a weighing of other factors, including the respective contacts and effects of the conduct at issue.

We take no position at this time on whether the committee should adopt the precise approach used in Timberlane, but we do feel strongly that the unfocused formulation in the present bill should not be adopted.

Furthermore, with respect to the question of treble damages, we agree with the Department of Justice that the committee should defer consideration of what measures to adopt. We are informed that a comprehensive study on treble damages is about to be completed, and the Department of Justice may see fit, thereafter, to recommend modifications of treble damage policies applicable to all litigation in the United States.

After studying the report and any recommendations that are made, the committee should consider what limitations may be desirable in connection with foreign entities. And I do suggest a couple of steps along those lines.

In sum, Senator, to protect U.S. markets, the antitrust laws must on occasion be applied to conduct which occurs outside our territories and to activities by citizens other than our own. But when they are, we must manage the reach of our laws with care and sensitivity.

I feel that your bill is a first and constructive step to organizing this Government in an effective way of doing that.

Senator DECONCINI. Thank you, Judge.

[Statement and responses to written questions of Senator Thurmond follow:]

June 21, 1985

TESTIMONY OF
ABRAHAM D. SOFAER, LEGAL ADVISER
DEPARTMENT OF STATE
ON S. 397

I am delighted to appear before this distinguished Committee today to testify on behalf of the Department of State on S. 397, "The Foreign Trade Antitrust Improvement Act of 1985." We appreciate this opportunity to present the Department's views to the Committee.

As Senator DeConcini noted when he introduced this legislation, the antitrust laws provide important protection to the free marketplace of the United States. Nevertheless, the application of the antitrust laws to foreign commerce, and in particular the suits filed by private attorneys general, have sometimes sparked controversy and friction between the United States and its trading partners. The State Department welcomes S. 397 as a constructive effort to resolve difficulties that have arisen from private antitrust suits which challenge the activities of foreign corporations. We support its goals and believe that it correctly focusses on the two major areas: the unwillingness of courts to dismiss suits, particularly without extensive discovery, and the availability of treble damages to private plaintiffs. We oppose the bill's specific proposals, however, because they inject purely political judgments into

JUDICIAL CONSIDERATION OF BOTH THE JURISDICTION AND TREBLE DAMAGES ISSUES.

THE SHERMAN ACT'S PROHIBITIONS ON ANTICOMPETITIVE CONDUCT APPLY TO CONTRACTS AND CONSPIRACIES, AS WELL AS TO MONOPOLIES AND ATTEMPTS TO MONOPOLIZE, IN U.S. COMMERCE "WITH FOREIGN NATIONS." ALTHOUGH EARLY CASES, SUCH AS AMERICAN BANANA CO. V. UNITED FRUIT CO., 213 U.S. 347 (1909), DID NOT VIEW THE SHERMAN ACT AS APPLYING TO ACTIVITIES IN FOREIGN TERRITORY, THE SHERMAN ACT IN MORE RECENT YEARS HAS BEEN INTERPRETED TO REACH ACTIVITIES OF FOREIGN CORPORATIONS IN FOREIGN TERRITORY WHICH HAVE "EFFECTS" ON U.S. COMMERCE (SEE UNITED STATES V. ALUMINUM CO. OF AMERICA, 148 F.2D 416 (2D CIR. 1945). THE "EFFECTS" TEST WAS STATUTORILY DEFINED IN THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1982, 15 U.S.C. SEC. 6(A), TO INCLUDE "SUBSTANTIAL, DIRECT AND REASONABLY FORESEEABLE EFFECTS."

OVER THE YEARS, NUMEROUS GOVERNMENT ANTITRUST INVESTIGATIONS AND CASES, AS WELL AS SOME PRIVATE ANTITRUST SUITS, HAVE BEEN BROUGHT AGAINST FOREIGN ENTITIES ALLEGING VIOLATIONS OF OUR ANTITRUST LAWS FROM THEIR ACTIVITIES IN INTERNATIONAL COMMERCE. THESE HAVE GENERATED FOREIGN RELATIONS DIFFICULTIES. PERHAPS THE MOST CELEBRATED EARLY INVESTIGATION WAS THE OIL CARTEL INVESTIGATION BY THE JUSTICE DEPARTMENT IN THE 1940S AND EARLY 1950S. THAT INVESTIGATION EVENTUALLY RAISED SUCH INTENSE INTERNATIONAL CONCERNS THAT FOR NATIONAL SECURITY REASONS PRESIDENTS TRUMAN AND EISENHOWER REQUIRED THE

JUSTICE DEPARTMENT TO PROCEED CIVILLY RATHER THAN CRIMINALLY. IN MORE RECENT YEARS, FOREIGN GOVERNMENT PROTESTS HAVE BEEN RAISED OVER OTHER GOVERNMENT INVESTIGATIONS, SUCH AS THE NORTH ATLANTIC AND SOUTH PACIFIC OCEAN SHIPPING INVESTIGATIONS OF THE LATE 1970S AND EARLY 1980S. THE MOST SERIOUS CONCERNS, HOWEVER, HAVE BEEN EXPRESSED OVER PRIVATE CASES, SUCH AS THE URANIUM CARTEL CASES BROUGHT BY WESTINGHOUSE AND THE TENNESSEE VALLEY AUTHORITY (IN RE URANIUM ANTITRUST LITIGATION, CONSOLIDATING IN RE TVA URANIUM ANTITRUST LITIGATION AND WESTINGHOUSE ELECTRIC CORP. V. RIO ALGOM LTD.), AND CURRENT CASES - ZENITH RADIO CORP. V. MATSUSHITA ELEC. INDUS. CO., AND LAKER AIRWAYS V. PAN AMERICAN WORLD AIRWAYS INC.

THE TENSIONS IN OUR RELATIONS WITH OTHER GOVERNMENTS FROM ANTITRUST CASES, AND PARTICULARLY PRIVATE CASES, HAVE SEVERAL CAUSES:

FIRST, U.S. ASSERTION OF JURISDICTION UNDER THE "EFFECTS" DOCTRINE IS OBJECTED TO BY SOME FOREIGN GOVERNMENTS AS A MATTER OF PRINCIPLE.

-- WHILE THE UNITED STATES TAKES THE VIEW THAT IT MAY ASSERT JURISDICTION WHERE IT HAS REASONABLE LINKS TO CONDUCT OR PERSONS VIOLATING OUR LAWS, MOST OTHER NATIONS HOLD MORE RESTRICTIVE VIEWS OF JURISDICTION. MOST OTHER GOVERNMENTS PLACE MORE WEIGHT ON THE TERRITORIAL ASPECTS OF JURISDICTION. FOR EXAMPLE, THE GOVERNMENT OF THE UNITED KINGDOM, ONE OF OUR LARGEST TRADING PARTNERS AND CLOSEST ALLIES, STRONGLY SUPPORTS A STRICT TERRITORIAL VIEW, PARTICULARLY REGARDING ECONOMIC AND BUSINESS MATTERS.

-- MANY INTERNATIONAL ANTITRUST CASES INVOLVE INTERNATIONAL COMMERCE IN WHICH FOREIGN SOVEREIGNS HAVE SUBSTANTIAL INTERESTS OF THEIR OWN. THEY BELIEVE THAT IN LIGHT OF THEIR CLAIMED INTERESTS AND PREROGATIVES SUCH CONDUCT SHOULD NOT BE SUBJECT TO SUITS BY PRIVATE PLAINTIFFS SEEKING TO ENFORCE U.S. REGULATORY POLICY. IN THE URANIUM LITIGATION, FOR EXAMPLE, THE GOVERNMENT OF CANADA ARGUED THAT U.S. COURTS SHOULD NOT TAKE JURISDICTION OVER A SUIT BROUGHT BY PRIVATE PARTIES SINCE THE CHALLENGED CONDUCT WAS UNDERTAKEN PURSUANT TO CANADIAN GOVERNMENT POLICY DIRECTIVES.

-- FOREIGN GOVERNMENTS SUCH AS THE UNITED KINGDOM ALSO REGARD CERTAIN SUBJECTS, NOTABLY INTERNATIONAL TRANSPORTATION, AS SO INHERENTLY AFFECTING THE INTERESTS OF MORE THAN ONE COUNTRY THAT THEY CAN BE REGULATED ONLY BY INTERNATIONAL AGREEMENT. THEY STRONGLY OBJECT TO WHAT THEY REGARD AS THE UNILATERAL EXERCISE OF U.S. ANTITRUST JURISDICTION OVER THESE MATTERS. IN THE SHIPPING ACT OF 1984, PUB. L. 98-237, PARTLY IN RESPONSE TO FOREIGN GOVERNMENT COMPLAINTS, U.S. LAWS GOVERNING INTERNATIONAL SHIPPING WERE AMENDED TO ELIMINATE PRIVATE ANTITRUST ACTIONS.

SECOND, U.S. ANTITRUST LAWS SOMETIMES PROHIBIT CONDUCT THAT OTHER GOVERNMENTS CONSIDER DESIRABLE AND MAY EVEN ENCOURAGE.

-- THE GOVERNMENT OF JAPAN HAS INFORMED U.S. COURTS THAT IT MANDATED THE MINIMUM PRICE AND MARKET ALLOCATION AGREEMENTS WHICH HAVE BEEN AT ISSUE FOR SOME TWELVE YEARS IN THE *MATSUSHITA* CASE.

-- Most foreign governments encourage price agreements among airlines in international aviation. Therefore, many governments protested strenuously the Civil Aeronautics Board's 1978 "IATA Show Cause Order" withdrawing antitrust immunity under which airlines participated in IATA price setting conferences. After more than a year of negotiations, the United States agreed in a Memorandum of Understanding to restore limited antitrust immunity in exchange for pricing concessions from the members of the European Civil Aviation Conference.

-- As noted above, the Government of Canada objected to the so-called Uranium cases, because the challenged price fixing activities of Canadian companies had been encouraged by the Canadian Government.

Third, anti-trust cases often generate protracted discovery and costs.

Discovery in American courts is often objectionable to other governments because it is time consuming, expensive, burdensome and frequently calls for production of documents from their territories. A few cases demonstrate this problem.

-- In Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), the District Court did not rule on defendants' motions to dismiss for seven years after the court of appeals remanded the case for additional discovery and a weighing of interests under its "jurisdictional rule of reason" test.

-- The Matsushita case, now before the Supreme Court, has been pending for 15 years and discovery has been ongoing during much of that time.

Objections to the extensive pretrial discovery entailed in these cases has led foreign governments to take steps to impede antitrust suits. Australia, Canada, France and the United Kingdom have enacted broad blocking statutes. More concretely, in the Uranium cases, the Supreme Court of Ontario, Canada refused to order the production of evidence sought under letters rogatory. And in the Laker case, the United Kingdom has twice invoked the Protection of Trading Interests Act to prevent the production of oral or written evidence from its territory even by U.S companies.

Fourth, foreign governments object strenuously to the availability of treble damages to private plaintiffs.

The existence of treble damage awards to private plaintiffs is unique to the United States. In principle, foreign governments regard as odious the delegation to private parties of the capacity to trigger punitive remedies in this sensitive area where they have significant interests. In practice, they object that their corporations may be subject to potentially huge damage awards or forced to settle for unwarranted amounts. In Laker, for example, the British Government has said that it has been forced to postpone its planned privatization of British Airways because of the pending litigation and British Airways' inability to estimate the cost of settlement or damages.

THESE CONCERNS HAVE LED OTHER GOVERNMENTS TO REGISTER STRONG DIPLOMATIC CONCERNS IN THE U.S. IN VARIOUS CASES, INCLUDING MOST RECENTLY MATSUSHITA AND LAKER. SOME GOVERNMENTS HAVE TAKEN STRONGER STEPS. AUSTRALIA, CANADA AND THE UNITED KINGDOM HAVE ENACTED STATUTES PROVIDING FOR "CLAWBACK" OF ALL OR PART OF TREBLE DAMAGE AWARDS. AS I HAVE ALREADY NOTED, THE U.K. HAS TWICE INVOKED ITS BLOCKING STATUTE IN THE LAKER LITIGATION AND IN THE SAME CASE HAS DENIED REQUESTS BY U.S. AIRLINES FOR PERMISSION TO PRODUCE U.K.-LOCATED DOCUMENTS.

THE ADMINISTRATION HAS WORKED TO MANAGE THESE PROBLEMS THROUGH BILATERAL AND MULTILATERAL ANTITRUST ARRANGEMENTS. WE HAVE AGREED TO BILATERAL MEASURES WITH CANADA, AUSTRALIA, AND THE FEDERAL REPUBLIC OF GERMANY. THE U.S. ALSO COMPLIES WITH THE NOTIFICATION AND CONSULTATION GUIDELINES FOR ANTITRUST INVESTIGATIONS ISSUED BY THE OECD RESTRICTIVE BUSINESS PRACTICES COMMITTEE. THESE ARRANGEMENTS, HOWEVER, ADDRESS DIRECTLY PUBLIC ANTITRUST ENFORCEMENT ACTIONS. DOMESTIC ACTION THROUGH LEGISLATION MERITS SERIOUS CONSIDERATION.

THE DEPARTMENT'S PRINCIPAL RESERVATIONS ABOUT THE BILL'S MAJOR PROPOSALS RELATE TO THE NATURE OF THE TASK IT ASSIGNS TO THE FEDERAL COURTS IN DEALING WITH JURISDICTION AND TREBLE DAMAGES. IT'S KEY DIRECTIVE ON JURISDICTION STATES:

> "[T]HE COURT SHALL ENTER A JUDGMENT DISMISSING SUCH ACTION WHENEVER IT DETERMINES THAT THE INTERESTS OF THE UNITED

> STATES SERVED BY THE ACTIONS ARE OUTWEIGHED BY THE INTERESTS OF ONE OR MORE FOREIGN NATIONS ADVERSELY AFFECTED BY THE ACTION."

THIS BILL, AS DRAFTED, CONTAINS NO GUIDELINES OR QUALIFICATIONS AS TO THE KINDS OF NATIONAL INTERESTS TO BE WEIGHED OR AS TO HOW THEY ARE TO BE WEIGHED. THIS FORMULATION WOULD INVITE THE COURTS TO MAKE NATIONAL INTEREST AND FOREIGN RELATIONS DETERMINATIONS FOR THE UNITED STATES AND OTHER COUNTRIES INVOLVED THAT ARE POLITICAL AND THUS PROPERLY FOR THE EXECUTIVE BRANCH UNDER OUR SYSTEM OF GOVERNMENT.

IT MAY BE THAT, IN THIS JURISDICTIONAL PROVISION, THE BILL SEEKS TO ADOPT AN APPROACH TAKEN IN _TIMBERLANE LUMBER CO_. V. _BANK OF AMERICA, SUPRA_. _TIMBERLANE_ DOES NOT SAY, HOWEVER, THAT JURISDICTION DEPENDS UPON A GENERALIZED DETERMINATION THAT THE INTERESTS OF ONE NATION OUTWEIGH THE INTERESTS OF THE OTHER. THE APPROACH SUGGESTED BY _TIMBERLANE_ CALLS FOR A MORE PARTICULARIZED AND CONCRETE WEIGHING OF THE DEGREE OF CONFLICT BETWEEN THE RELEVANT UNITED STATES AND FOREIGN LAW, AND A WEIGHING OF OTHER FACTORS, INCLUDING THE RESPECTIVE CONTACTS AND EFFECTS OF THE CONDUCT AT ISSUE. ALL OF THESE CONSIDERATIONS GO INTO AN ASSESSMENT, NOT SIMPLY OF WHAT STATE HAS GREATER INTERESTS, BUT OF THE REASONABLENESS OF THE EXERCISE OF JURISDICTION IN THE OVERALL CONTEXT.

WE TAKE NO POSITION AT THIS TIME ON WHETHER THIS COMMITTEE SHOULD ADOPT THE PRECISE APPROACH USED IN TIMBERLANE. CLEARLY, THOUGH, THE UNFOCUSSED FORMULATION IN THE PRESENT BILL SHOULD NOT BE ADOPTED. RATHER, ONCE A COURT HAS FOUND LEGALLY SUFFICIENT EFFECTS ON THE FOREIGN COMMERCE OF THE U.S., THE COURT SHOULD DECIDE WHETHER TO EXERCISE JURISDICTION ON THE BASIS OF MORE CONCRETE FACTORS, SUCH AS:

-- THE DEGREE OF CONFLICT BETWEEN THE LAWS OF THE RESPECTIVE STATES;

-- THE EXTENT TO WHICH ENFORCEMENT BY EITHER STATE CAN BE EXPECTED TO ACHIEVE COMPLIANCE;

-- THE EXTENT TO WHICH THERE IS AN EXPLICIT PURPOSE TO HARM OR AFFECT AMERICAN COMMERCE;

-- THE FORESEEABILITY OF SUCH AN EFFECT;

-- AND THE RELATIVE SIGNIFICANCE OF SUCH AN EFFECT ON THE U.S. AS COMPARED WITH ITS SIGNIFICANCE ELSEWHERE.

IF A WEIGHING OF ALL PROPER FACTORS SUGGESTS JURISDICTION SHOULD NOT BE ASSERTED, THE COURT SHOULD CEASE ITS INQUIRIES. IF, HOWEVER, AN ANALYSIS OF THESE FACTORS SUGGESTS THAT JURISDICTION SHOULD BE ASSERTED, THE COURT SHOULD ALLOW THE CASE TO GO FORWARD, UNLESS THE U.S. INFORMS THE COURT THAT ASSERTION OF JURISDICTION HARMS U.S. FOREIGN POLICY INTERESTS. IN THE LATTER SITUATION -- WHICH WE BELIEVE WOULD ARISE ONLY RARELY -- WE BELIEVE IT WOULD BE INCUMBENT UPON THE COURT NOT

TO EXERCISE JURISDICTION, IN DEFERENCE TO THE EXECUTIVE'S POLITICAL DETERMINATION.

THE NOTION OF BALANCING FACTORS WITH A VIEW TO DETERMINING WHAT COMITY AND FAIRNESS REQUIRE ARE TRADITIONAL JUDICIAL TASKS, FAMILIAR TO COURTS IN A VARIETY OF CONTEXTS, ESPECIALLY CONFLICTS OF LAW AND _FORUM NON CONVENIENS_ DECISIONS. PRECISE BALANCING OF THE INTERESTS OF THE UNITED STATES AGAINST THOSE OF FOREIGN STATES IS, ON THE OTHER HAND, A RELATIVELY RECENT SUGGESTION AND ONE WHICH HAS BEEN SUBJECTED TO SOME COGENT CRITICISM, FOR EXAMPLE BY JUDGE WILKEY IN HIS RECENT _LAKER_ OPINION. _LAKER AIRWAYS LTD._ V. _SABENA, BELGIAN WORLD AIRLINES_, 731 F.2D 909, 948-953 (D.C. CIR. 1984). I SHARE HIS DOUBTS AS TO WHETHER IT IS A JUDICIALLY MANAGEABLE STANDARD APPROPRIATE FOR JUDGES TO APPLY IN OUR SYSTEM OF SEPARATED POWERS.

MY OFFICE IS CONSIDERING THE POSSIBILITY OF ALTERNATIVES OR MODIFICATIONS TO S. 397. WE HAVE NOT YET FORMULATED PRECISE SUGGESTIONS. WE BELIEVE, HOWEVER, THAT SOME OF THIS BILL'S PURPOSE MIGHT BE ACCOMPLISHED BY REQUIRING MORE SPECIFIC PLEADING AT THE OUTSET OF THE SUBSTANTIALITY OF THE EFFECTS INVOLVED IN A PRIVATE CASE. APPLICATION OF THE _FORUM NON CONVENIENS_ DOCTRINE, IN THE BILL, MIGHT ALSO, IN ONE VIEW, ALLEVIATE PERCEIVED DIFFICULTIES.

WITH RESPECT TO TREBLE DAMAGES, THE COMMITTEE SHOULD DEFER CONSIDERATION OF WHAT MEASURES TO ADOPT. WE ARE INFORMED THAT A COMPREHENSIVE STUDY OF THIS SUBJECT IS UNDERWAY WHICH WILL BE

COMPLETED THIS YEAR. THE DEPARTMENT OF JUSTICE MAY SEE FIT THEREAFTER TO RECOMMEND MODIFICATIONS OF TREBLE DAMAGE POLICIES APPLICABLE TO ALL LITIGATION. AFTER STUDYING THE REPORT, AND ANY RECOMMENDATIONS THAT ARE MADE, THE COMMITTEE SHOULD CONSIDER WHAT LIMITATIONS MAY BE DESIRABLE IN CONNECTION WITH FOREIGN ENTITIES. AMONG THE POSSIBLE STEPS WE BELIEVE SHOULD BE CONSIDERED WOULD BE LIMITING TREBLE DAMAGES TO COVERT CONDUCT, SUCH AS SECRET PRICE FIXING, AND REQUIRING A LOSING PLAINTIFF, WHO INSISTS ON SEEKING TREBLE DAMAGES, TO PAY ALL OF EACH DEFENDANT'S ATTORNEYS' FEES.

IN SUM, IN ORDER TO PROTECT UNITED STATES' MARKETS, THE ANTI-TRUST LAWS MUST ON OCCASION BE APPLIED TO CONDUCT WHICH OCCURS OUTSIDE OUR TERRITORIES AND TO ACTIVITIES BY CITIZENS OTHER THAN OUR OWN. BUT, WHEN THEY ARE, WE MUST MANAGE THE REACH OF OUR LAWS WITH CARE AND SENSITIVITY. THE CONGRESS AND THE EXECUTIVE BRANCH HAVE SUBSTANTIAL RESPONSIBILITY FOR ASSURING THAT THIS IS DONE. WHILE THE COURTS HAVE AN IMPORTANT ROLE TO PLAY, THEY SHOULD NOT BE GIVEN ESSENTIALLY POLITICAL TASKS. I WELCOME THIS LEGISLATIVE INITIATIVE TO ADDRESS THE PROBLEM AND I WOULD BE PLEASED, TOGETHER WITH THE DEPARTMENT OF JUSTICE AND OTHER AGENCIES, TO WORK WITH THE BILL'S SPONSORS TO SEE IF SOME REVISED PROPOSALS COULD BE DEVISED TO MEET OUR COMMON CONCERNS.

RESPONSES OF ABRAHAM D. SOFAER, LEGAL ADVISER
U.S. DEPARTMENT OF STATE
TO WRITTEN QUESTIONS FROM THE
SENATE JUDICIARY COMMITTEE
CONCERNING S.397

1. The bill before us concerns private antitrust suits in which there are potential adverse effects on "foreign interests". In your view, how numerous are such suits and how often do such circumstances occur?

A: Every private antitrust suit naming a foreign corporation as a defendant presents the potential of adverse effects on "foreign interest," but relatively few suits have brought complaints from foreign governments. In recent years, these have included the Uranium cases; the International Association of Machinists' case against the OPEC countries; the Japanese consumer electronic cases (now pending before the Supreme Court); and the Laker case, in which settlement has just been announced. These cases have challenged conduct that was consistent with the regulatory directives or policies of the foreign government or governments concerned. In the Japanese consumer electronics case, plaintiffs' allegations encompass conduct compelled by the Government of Japan.

The number of suits which adversely affect foreign interests does not indicate that the problems addressed by the legislation are not serious. The cases which have arisen have involved significant interests of the United States' major trading partners, including Canada, the United Kingdom, Australia and Japan. They have raised issues of how an international, multijurisdictional trading system is to be regulated. Foreign governments' concerns have been raised at the highest levels and have colored their approaches to other problems. Given the significance of the foreign interests affected, Congress and the Executive should consider whether the current provisions for private antitrust enforcement, with attendant across-the-board treble damages, continue to be appropriate.

2. I am interested in the nature of the "foreign interests" that would be articulated by the Executive Branch and balanced by the courts under this bill. Would such interests be foreign commercial interests or foreign sovereignty interests?

A: Before responding to the substance of this question, I note that the Administration does not support the bill's requirement that the Attorney General appear, upon request by a court, at the jurisdictional and damage phases of a case. This could place the Executive Branch in an awkward position in certain cases, requiring it to take a position when it might prefer, for many reasons, not to do so.

If the Executive were to appear, the nature of the factors to be considered would be those relevant to a particular case. It is difficult to state in the abstract what factors may be considered since the bill, as drafted, provides for an open-ended interest balancing test. We have previously criticized this aspect of it. In any event, however, we would not contemplate presenting purely commercial interests. For example, if a foreign government is operating a commercial enterprise and objects to a private suit solely on that basis, we would almost certainly not present such an interest to a court.

3. As a former judge, how would you assess the ability of the courts to evaluate the foreign interests at issue in this bill and to balance them against private causes of action?

A: I believe that courts cannot and should not attempt to conduct fine-line balancing of U.S. political interests against those of foreign governments. However, I also believe that courts should consider the factors they have traditionally addressed in conflicts of laws and to some extent forum non conveniens cases. In this process, I do not believe that courts should make independent foreign affairs determinations.

4. To what extent, if any, do you believe that private interests of plaintiffs in recovering for antitrust injury would be subordinated to other interests under this bill?

A: It is impossible to state in what circumstances courts would subordinate the plaintiff's private interests to foreign government interests by either declining jurisdiction or detrebling damages. The bill as drafted appears to call upon the courts to decline jurisdiction in an international case if a court finds that interests of a foreign state outweigh those of the United States to any extent. Moreover, it does not provide any guidance to the courts on what factors to consider. These features have been among the Administration's important concerns about the proposal as drafted.

5. How do you reconcile your failure to support S. 397, or to offer any alternative, with the following statement made by Secretary of State Shultz in a major policy speech delivered a little over a year ago:

> "[Extraterritorial application of U.S. law] is, in fact, a matter of some urgency. Increasingly, conflicts of jurisdiction are resulting in defensive and retaliatory actions on the part of some foreign governments.
>
> A number of countries have enacted 'blocking' statutes seeking to forbid individuals or companies from complying with U.S. law or regulation. In 1980, for example, Britain enacted the "Protection of Trading Interests Act." . . . The act . . . authorizes a British company to retaliate against private treble-damage antitrust awards by filing a countersuit in British courts.
>
> In addition, the prospect of application of our laws to offshore conduct is beginning to result in new barriers to investment. Acquisitions and mergers have also been impeded, and foreign manufacturers are beginning to seek alternative sources of supply to replace U.S. sources that are considered unreliable."

A: My views on this legislation are completely consistent with Secretary Shultz's comments. Private antitrust suits are part of the problem he was addressing. We agree fully that private antitrust suits present a problem that warrants consideration by Congress and the Executive. However, legislation amending the Clayton Act to address these problems should be considered carefully in light of the functions of our judicial and executive branches and, further, in the context of antitrust enforcement as a whole. The Executive is engaged through the

OECD in procedures designed to manage problems that may be raised by government enforcement of the antitrust laws.

6. From transcript (p. 15): Would you go so far as to submit some draft suggestions as to specifics based on the cases that you know of?

A: I believe courts could properly consider the following possible factors in deciding questions properly placed before them by legislation or precedent:

1. The nationality or allegiance of the parties;
2. The locations or principal places of business of corporations;
3. The availability of a remedy abroad;
4. The pendency of litigation involving the same factual and/or legal issues abroad;
5. The extent to which enforcement by either state can be expected to achieve compliance;
6. The extent to which there is an explicit purpose to harm or affect U.S. commerce; and
7. The foreseeability of such an effect.

In addition, I believe courts may also, in appropriate contexts, consider the factors set forth below, which should be understood as relating to the specifics of the case and the germane laws and directives of the foreign state and not as calling for the courts to consider broader foreign affairs concerns:

1. The relative importance to the violations charged of conduct within the United States as compared with conduct abroad;
2. The degree of conflict with foreign law; and
3. The relative significance of the conduct's effect on U.S. commerce, as compared with its significance elsewhere.

Senator DECONCINI. I note that Secretary of State Schultz and Deputy Secretary of State Kenneth Dam and others have spoken very favorably of the need for doing something legislatively, although they have not been as specific as this bill before us. Certainly there seems to be a considerable interest in the State Department in addressing this problem.

Judge SOFAER. I can assure you, there is.

Senator DECONCINI. Judge, the question was raised by Mr. Rule about the Federal courts' ability to balance the U.S. and foreign interests as contemplated by section 3 of this legislation. Some feel that this is more than the courts can do or should be expected to do.

Would you care to comment? Are the courts able to conduct this sort of balance?

Judge SOFAER. Well, courts are traditionally engaged in a balancing of factors and interests in connection with certain traditional doctrines, such as forum non conveniens, or in the process of selecting the applicable law. So it is a process that I have no objection to as such. But I do not think that this bill gives the courts enough guidance as to the manner in which they should go about engaging in this process.

Senator DECONCINI. As a former judge, how specific should we be in that area, in your judgment?

Judge SOFAER. Well, I think that you should be specific about those factors that you know are relevant, based on the litigation that we have had. And then you can leave it open for the courts to weigh other things, if you want to take that approach.

I would be happy, and of course I look forward to working with you and your staff and with the Department of Justice together on developing——

Senator DECONCINI. Would you go so far as to submit some draft suggestions as to specifics based on the cases that you know of?

Judge SOFAER. I certainly think that Mr. Rule and I can sit down together and get an administration document up to you at some point. We would be happy to do that.

Senator DECONCINI. Thank you. I am going to ask Mr. Rule to do the same thing.

Judge SOFAER. Well, let me say that I do echo Mr. Rule's comment about the fact that judges are not to be made Secretaries of State.

There are many cases that have arisen where we have seen how a particular district judge out of some 500 that are sitting in this country may go off on a very peculiar basis. I see you nodding, Senator, and I am not particularly happy to see you nodding in such vigorous agreement. But I must say it is true.

The Iranian claims case is one in which a district judge made a decision that was reversed on an expedited basis, nine-nothing, in the Supreme Court of the United States. It is that kind of a thing that we are worried about.

Senator DECONCINI. Well, I appreciate that, and of course, the intent of the bill is not to encourage judicial activism in the foreign policy of this country.

Mr. Rule, does the administration oppose providing Federal courts with the power to detreble antitrust actions where doing so will substantially reduce international conflicts over the assertion of their jurisdiction?

Mr. RULE. Senator, our view is that at this time, in the context of S. 397, we think it would be more appropriate to defer consideration of that to the context of a more comprehensive detrebling proposal, that we feel will probably be introduced by someone after the Georgetown study is completed, and we also indicate in our statement that there may be other ways to consider detrebling.

But we are concerned that the way in which S. 397 provides detrebling is not the appropriate way that detrebling should be provided, with no regard for the nature of the conduct, with regard only for political factors that courts are called upon to balance and make a judgment on.

Senator DECONCINI. When will the Georgetown study be completed?

Mr. RULE. That is, frankly, difficult to say. I understand that, on the current track, it is due sometime this fall or early winter. But that is really up to the folks at Georgetown who are doing it—but that was the last time I checked.

Senator DECONCINI. Mr. Rule, isn't that kind of a copout for the Justice Department to hang its hat out there on some study from the University—Georgetown, as credible as that fine institution is? Shouldn't the Justice Department have within its own resources the ability to come forward with something constructive?

Before you answer that question, I note in your statement that the Justice Department believes this bill provides a good starting point for serious consideration of foreign antitrust problems, but, for the reasons you furnish, the Department cannot support it.

What can the Justice Department do to offer us something constructive? I did not introduce this legislation to bring on a conflict between this body and the Justice Department. What I am attempting to do here is to see what can be done to resolve a problem that is very detrimental to American business and commerce and, ultimately, to the American consumer. I wonder if we can expect or ask the Justice Department to submit some suggested constructive changes on this legislation and not wait until early November when the Georgetown study may or may not be on track?

Mr. RULE. Yes, sir. As Judge Sofaer has said, we will be happy to work with them and with the other interested agencies within the administration to come up with something that may be appropriate to and work with the committee.

My comments and the Department's comments and the administration's comments with regard to detrebling go to that issue and the fact that we think that if this committee focuses solely on foreign antitrust matters in this way, we may be missing the bigger picture, and perhaps it should be viewed in the context of the overall question of treble damages.

Senator DECONCINI. Mr. Rule, when might we expect that you would submit something to us? Should we hold our breath, or shall we take our vacations?

Mr. RULE. I would not want to advise you to hold your breath, Senator. But we will certainly work with the State Department on——

Senator DECONCINI. Should it take 1 month or 2 months, or——

Mr. **Rule**. I would hate to commit the administration at this point to any specific time, but we will certainly look at it as quickly as possible.

Senator **DeConcini**. I do not mean this to be anything other than constructive, if you will take it in that way, but in our railroad bill, you have questions that have been submitted to you over 6 weeks ago, and we have yet to have any answers supplied to us. I wonder, can we expect anything more expeditious than that in this instance?

Mr. **Rule**. Well, I certainly will check on the railroad bill answers, and we will get back to you. Indeed, as you may know, we have talked to some folks on this bill.

Senator **DeConcini**. I would appreciate that. You will let us know, of course, how long you expect it will take to submit something. Maybe it will just coincide with the November date of the Georgetown study? In either case, I would just like to know.

Mr. **Rule**. Well, as I say, it really is something that I would like to talk to the State Department and the various folks around the administration before we make a commitment, Senator.

Senator **DeConcini**. Senator Metzenbaum, I have to leave. If you can stay and ask your questions and make your statement, there is supposed to be another Senator on the way.

I will turn the gavel over to you.

Senator **Metzenbaum** [presiding]. Senator DeConcini, I can stay for a brief period, but if the other Senator does not arrive, I am going to have to leave myself.

Senator **DeConcini**. That is understood.

Senator **Metzenbaum**. And I feel bad about that, because there are many people who have obviously shown up. But frankly, I do not think we are going to pass this legislation anyhow, so they ought to go home.

Mr. Rule, let me ask you a question. Do I get from you, inferentially or by implication, an indication that the administration supports detrebling of damages generally with respect to the antitrust laws?

Mr. **Rule**. You should not draw that inference from my statement. It is something that we think should be seriously considered once the Georgetown study comes out, and it is something that we will be looking at. But we have by no means reached that conclusion.

Senator **Metzenbaum**. I ask that question because I am aware of your recent statements indicating that bigger is better, and that mergers do not hurt consumers. And as I read those statements—and I have not had the privilege of meeting you, I do not think, prior to this meeting—I am wondering whether or not you come from that same school as did one of your predecessors, Mr. Baxter, who really did not believe that the antitrust laws added very much to the laws of this country, and each time he spoke out, he indicated his strong differences. What school do you come from? Do you think the antitrust laws are right? Do you think that they provide the proper thrust? Are they in the proper interest of this Nation? Or, do you think we might possibly consider just repealing them?

Mr. **Rule**. Well, I certainly do not think we should repeal them. I think they are an extremely important part of this country's legal and economic structure, and I think that one has to take a reasonable and, as the Supreme Court has said, a consumer welfare approach to the law and apply it in that manner. And there may be areas, Senator, where you and I disagree as to the application of the antitrust laws, but I think we both can agree that it is extremely important to make sure that market forces are free from unnecessary, unwise, inappropriate governmental and private restraints, and I believe in that very strongly. And I believe very strongly, for example, in the effort the Department has made over the last 5 years vigorously to prosecute criminally, to try to get people in jail who commit antitrust violations.

So I definitely do not believe that the antitrust laws should be repealed.

Senator METZENBAUM. Coming back to the treble damage issue, wouldn't you say that this would lead one to believe that there is rather strong support for detrebling in the administration? I quote you:

> The Administration looks forward to the release of the Georgetown University study on treble damages, which may contribute empirical insight into whether and in what form comprehensive detrebling reform legislation is appropriate. Unless the Georgetown study unequivocally indicates that private treble damages are not deterring efficient potentially pro-competitive conduct, it may be appropriate for Congress to consider whether a comprehensive reexamination of antitrust remedies in general, and treble damages specifically, is necessary.

That certainly would lead one to conclude that there is considerable sentiment in the administration for detrebling of damages.

Mr. RULE. Well, as I say, we are not ready to come out and support any particular proposal. I think the Senator knows that in the past, we have thought that there are, at the very least, certain aspects of detrebling that may create problems and that should be analyzed. Indeed, we worked very closely with your staff on the joint R&D bill, which we agreed at the time was a very unique situation. But I do think that there is a broader question of whether or not treble damages across-the-board automatically are always appropriate. I think it is, therefore, appropriate to reevaluate that, once we have some empirical data from the Georgetown study. There are some—and I include myself among them—who think that there may be instances, and there probably are instances, where trebling damages is overdeterring very procompetitive conduct that benefits consumers.

Senator METZENBAUM. Could you give me some idea of how trebling damages deters procompetitive activity which would benefit consumers?

Mr. RULE. Yes, sir; as you currently know, there is a great deal of antitrust conduct that falls within the rubric of the rule of reason, and it is not always clear to folks who engage in it at the time whether or not that particular type of conduct is going to be condemned or upheld by a court of law. And because of that uncertainty, and because of the somewhat confused state of the law in certain areas, a businessman or woman may just decide that even though he or she thinks that a particular type of conduct is going to be extremely efficient—lower their costs, enable them to compete more effectively with competitors—they may decide to refrain from doing so because of the threat of treble damages. That certainly could happen.

Senator **Metzenbaum**. Let me get that clear, let me get that clear. If I understand what you just said, a businessman might refrain from certain procompetitive activities by reason of a fear of treble damages. This is not a new subject to me, and I am trying to envision that actual case where businessperson A, B, or C would refrain from procompetitive activity by reason of a fear of treble damages. Give me a specific example.

Mr. **Rule**. Well, a specific example might be a type of vertical restraint involving territorial allocations.

Senator **Metzenbaum**. Vertical restraints are procompetitive? Is that what you are saying to me?

Mr. **Rule**. That is what the Supreme Court said; yes, sir.

Senator **Metzenbaum**. That vertical restraint is procompetitive?

Mr. **Rule**. A vertical restraint may be procompetitive; yes, sir.

Senator **Metzenbaum**. Tell me exactly how that works.

Mr. **Rule**. Well, there are a number of ways. For example, you could have a product, a computer—I think you are familiar with the "free rider" scenario—a computer that requires a great deal of dealer service at the point of sale to inform consumers as to how to use the computer, what the benefits of it are, and that sort of thing, relative to other computers, and if there is not a territorial restriction, for example, on other dealers selling next to that one dealer, the consumer may be able to turn around and go to a discount warehouse store and buy the computer off the floor without paying for the services, thereby undermining the incentives to provide those beneficial services that enhance consumer welfare and are generally recognized—not just by economists, not just by the Department, but indeed, as you know, by the Supreme Court in a number of recent decisions—to be helpful to the economy. But the problem is, because the law may not be entirely clear, a manufacturer may refrain from engaging in those restraints out of fear of treble damages. The court may make a mistake, that sort of thing, and the ex ante, as the economists would say, cost of engaging in the restraint may outweigh its benefits, even though on balance for society, if the firm went ahead and did it, society would be better off, consumers would be better off.

Senator **Metzenbaum**. I confess that I am still confused. But since my colleague has now arrived, I am going to yield to him and let him carry on from here.

Senator McConnell, it is nice to welcome you. I am going to have to excuse myself, but I am certain that you will get along somehow without me.

Senator **McConnell** [presiding]. I will try to, Senator Metzenbaum. This is the first time that you have ever stopped talking when I showed up. [Laughter.]

I am sorry to be late, gentlemen.

I would like to interject at this moment and put an opening statement for this hearing in the record, and then let you guys continue.

[Statement follows:]

OPENING STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I commend you for holding this hearing today on the bill that has been introduced proposing improvements to the antitrust laws and the way that those laws are applied in an international or multinational context. We are all becoming aware that American business is increasingly dependent on trade with foreign businesses, and that the days when American commerce could be transacted, and American laws applied, independently of the interests and legitimate concerns of foreign interests, are long gone. It is therefore appropriate that a close look be taken at the laws that guide our courts in private antitrust lawsuits in these situations.

In recent years, it has become increasingly apparent that the assertion of American antitrust law over the conduct of American and foreign business abroad has created serious international tensions between the United States and its trading partners. Foreign governments have criticized and sometimes retaliated against the extraterritorial aspects of the United States' antitrust laws. The treble damage provisions of these laws are apparently the most troublesome components of the American laws.

It is not surprising that the judicial decisions dealing with these laws have developed a somewhat disjointed body of law, for the decisions have necessarily been ad hoc attempted to deal with the problem, attempts guided by cryptic statutes enacted many years ago, at a time when the complex international structure that now exists in the United States, the treble damage approach to enforcement of the antitrust laws is neither accepted in nor particularly welcome in many foreign countries.

I know of one situation in my home State of Kentucky in which a litigant involved in a major piece of litigation with a French manufacturer was unable to obtain necessary documents because the French Government's blocking statute, a statute designed specifically to retaliate against the American antitrust laws prevented it. It was only after long, expensive legal battles that the litigation was able to proceed, and it proceeded in Switzerland, at great additional cost.

Thus, it certainly seems that S. 397 and its approach to creating a legislative solution is a sensible one, at least without the benefit of more information. As I understand it, the bill would require that both the interests of the United States and of the foreign nation or nations involved in any given case must be taken into account in adjudicating private treble damage actions. By doing so, it seeks to lessen tensions that result from the extraterritorial application of the domestic antitrust laws, without sacrificing the legitimate interests of the United States. To the extent that the bill manages to accomplish that, it is certainly deserving of support.

On the other hand, I am always somewhat skeptical of piecemeal changes in or alterations to the antitrust laws, on the theory that if "antitrust," and all that it has come to mean since the Sherman Act was passed 95 years ago has salutory effects for industry in general, then it ought to apply uniformly.

There are a number of aspects of the bill that remain to be discussed and considered, and I look forward to hearing the testimony of the witnesses on these matters as well as on the bill in general. Thank you, Mr. Chairman.

Senator McCONNELL. Staff informs me that there will be additional written questions to be submitted to you all for insertion in the record, and I think that completes your testimony, unless you have something else to add.

Thank you.

Mr. RULE. Thank you, Senator.

Judge SOFAER. Thank you.

Senator McCONNELL. I would like to call now James S. Campbell and David Westin, from Wilmer, Cutler & Pickering, who are going to provide some further background information on this subject.

Go right ahead, gentlemen.

STATEMENT OF JAMES S. CAMPBELL AND DAVID WESTIN, LAW FIRM OF WILMER, CUTLER & PICKERING, WASHINGTON, DC

Mr. CAMPBELL. Thank you, Senator.

My partner, David Westin, and I are pleased to appear before the committee this morning in strong support of S. 397.

As our prepared statement indicates, we are appearing as individuals and expressing our personal views. We do not this morning speak for our law firm or for any of the clients of our law firm, many of whom have had experiences with the kinds of problems to which this legislation is directed.

Our prepared statement is somewhat lengthy, and I will try to summarize very briefly the first two portions of it. My colleague, Mr. Westin, will then cover the third part, which is specifically directed at some of the provisions of S. 397.

Senator McCONNELL. We will insert your full statement in the record and appreciate your willingness to summarize.

Mr. CAMPBELL. Thank you, Senator. Accompanying our statement are two law journal articles, and I trust they can also be inserted in the record at this time. First, we have attached an article by Prof. Karl Meessen in the American Journal of International Law; it discusses comprehensively the whole subject of international conflicts of antitrust jurisdiction. The second article that we have appended to our statement is a comment in the Cornell Law Journal that analyzes and applies an appropriate methodology of balancing national interests in international antitrust cases. We believe that this comment is the kind of source to which one would turn for an answer to the questions about balancing national interest that were raised by the administration witnesses in their testimony earlier this morning.

In our testimony, we have attempted to contribute to the record that this committee is making concerning S. 397. In the first section of our testimony, we have tried to describe how international conflicts of antitrust jurisdiction come about. They basically come about because, as has been often pointed out, business conduct is not confined within national boundaries. The products that we buy in the United States are often manufactured abroad. Some commerce is inherently international, as, for example, shipping or international aviation. Thus it often happens that more than one jurisdiction will apply its competition laws to business conduct—and appropriately so.

The competition laws of the various jurisdictions—the United States, the European Economic Community, West Germany, United Kingdom, and so on—are not harmonized with each other. Even if one looks at the jurisdictions which have competition laws most similar to those of the United States—such as, for example, West Germany—one still finds that there are substantial differences. We go into these differences in some detail in the first part of our testimony.

The result of the differences among national competition laws is that there can be conflicts between jurisdictions. Conduct that is permissible or encouraged by one jurisdiction may be condemned by another. The methods of investigating business conduct may be quite different and may be found to be intrusive or objectionable by the other jurisdiction. Even if there is agreement by the interested jurisdictions that the conduct ought not to be engaged in, the penalties associated with engaging in the conduct may be dramatically different as between jurisdictions.

As a result of this state of affairs, there have been in the post-World War II period quite a substantial number of international antitrust conflicts. We have summarized 16 of these conflicts on pages 12 to 19 of our testimony. From this history, we draw certain conclusions in our testimony that we believe are relevant to the problem of international antitrust conflicts addressed by S. 397.

In this summary, I would like to highlight just one of those conclusions, from pages 22 and 23 of our testimony, because the administration witnesses here this morning have spoken of S. 397 as if its provisions are novel ideas put forth to deal with what is treated by the administration as if it were a new problem.

Well, it is certainly true that S. 397 would be a first step by the Congress to deal with the international conflicts caused by U.S. private antitrust actions, but it is not true that this is in any sense a new problem. And we would submit that it is a problem that the executive branch has failed to address for much too long a period of time.

Let me read from our prepared statement at pages 22 and 23:

> We conclude that the history of international antitrust conflicts shows that U.S. antitrust enforcement authorities have failed to assume responsibility for bringing comity considerations to bear on the resolution of private antitrust litigation affecting foreign governmental interests, even private litigation following on or encouraged by government grand jury investigations. The Department of Justice, notwithstanding its active participation as amicus in private antitrust cases, raising important substantive legal issues, has been unwilling to appear as an amicus in private antitrust cases with international repercussions, even when requested to do so by affected private parties or by the court itself, as in the private antitrust action against the OPEC cartel. These nonappearances have sometimes exacerbated the conflicts, as in the uranium litigation, and have led to proposals by former Department officials that Justice appear as an amicus in cases where the court would benefit from executive branch assistance in balancing the relevant national interests. We note in this regard that the bilateral antitrust agreements with Canada and Australia require the Justice Department to report upon request of the foreign government to U.S. courts in private antitrust suits on any consultations or national interests relevant to the suit.

In sum, then, we think that there is clearly, in light of the history that we recount in our testimony, a problem created for the United States and for United States business by private antitrust enforcement affecting international commerce. We believe that the executive branch has failed adequately to address that problem, and we welcome the contribution that S. 397 would make in enabling the courts to deal with it.

At this point, my colleague, Mr. Westin, will address some of the specifics of S. 397.

STATEMENT OF DAVID WESTIN

Mr. WESTIN. Thank you, Senator.

As my colleague, Mr. Campbell, has pointed out, there is a substantial problem confronting private litigants, the U.S. Government, and foreign governments at the present time. As I understand the administration witnesses who testified earlier, they do not disagree that there is a problem.

I would now like to explain briefly why Mr. Campbell and I feel that S. 397 is an excellent way of approaching this problem and dealing with it effectively.

With respect to two of the provisions of S. 397, that is, the so-called forum non conveniens provision and the provision for deciding subject matter jurisdiction early, I understand that there is no dispute. The administration witnesses have said that they have no real problems with those provisions. The real issues appear to arise with respect to the jurisdictional rule of reason and the detrebling provisions.

With respect to the jurisdictional rule of reason, I would make three points, briefly.

First of all, the notion that U.S. courts—both State and Federal—in some circumstances, ought to consider foreign interests in determining the extent to which they will assert their jurisdiction over U.S. and foreign parties is not a new one. This is something that dates back to the very beginnings of our legal heritage in the United States, going back as far as Justice Story in the 18th century and his commentaries on conflicts of law. Justice Story recognized the need and the appropriateness for U.S. courts to take into account foreign interests in ameliorating their exercise of jurisdiction. At least as early as 1893, the Supreme Court, in *Hilton* v. *Guyot*, explicitly recognized the need not only for the executive branch or the legislative branch of the United States to take into account foreign interests, but for the judicial branch to do so as well.

At the present time, U.S. courts routinely take into account foreign interests. Take as a specific example the discovery area. Often, in both governmental and in private cases, U.S. courts issue broad-ranging discovery orders covering evidence located abroad. Invariably, in these situations, litigants argue that such discovery orders should either be withdrawn altogether, or should be curtailed, because of the extent of interference with foreign interests. Indeed, the U.S. Government itself makes arguments to the courts concerning the balance of interests, and U.S. courts routinely take such arguments into account. This balancing, therefore, is not a new matter. It is something that is done often in other contexts, and it is something that ought to be done routinely in U.S. antitrust cases.

So my first point is that the jurisdictional rule of reason is a doctrine with a good, solid basis in history.

My second point is that there already is a developing common law in this area. As Mr. Campbell has pointed out, we have set forth some 16 prior cases dating back to the 1940's in which U.S. courts have dealt with these international conflicts arising from antitrust cases and have come up with various rules to try to resolve the conflicts.

We have a number of cases beyond those 16 now. Thus, the courts have already begun to work out a common law of what factors they need to take into account and how they should be weighed. Beyond that, there is a substantial body of scholarly work, two pieces of which we have attached to our testimony in which some scholars have spent literally their entire careers sorting out these sorts of conflicts and making recommendations for courts to follow on how to resolve conflicts.

So the second point I make is that there already is a developing common law in this area.

Third, I would say in response to Judge Sofaer's excellent comments that, insofar as S. 397 by its terms seems too open-ended to the administration, it certainly is open to clarification. As we have said in our written statement, we hope that this committee and the Congress will include in the legislative history specific recommendations to the courts on what guidelines to follow in balancing under the jurisdictional rule of reason. So that is a problem that can be dealt with effectively, and it certainly is not a reason not to vote affirmatively on S. 397.

Those are my comments on the jurisdictional rule of reason. Let me briefly make four points about the so-called detrebling provision. in S. 397.

First, it is very important—and I am afraid that the administration witnesses may have misunderstood this—to understand that, at least as we understand the intent behind S. 397, it would not be restricted to foreign defendants—by no means. Often, if not invariably, we would expect that if a case was to be detrebled, it would be detrebled as to all of the defendants.

The second point has to do with the need for study of the treble damage issue. Certainly, this is an issue that can be studied and probably will be studied forever. But we would point out that Congressman Rodino performed an exhaustive study for the Congress some 2½ years ago. That study concluded that we should not address the question wholesale, but specifically address it in three areas, two of which—municipal liability and research and development—the Congress has recently dealt with. The third area identified by the Rodine study was exactly that addressed by S. 397: the area of foreign antitrust conflicts.

So there has been a study done, not by Georgetown, but by this Congress, on the question. We suggest respectfully that there has been enough of study in this particular area; we should get on with the job.

The third point I would make is that the detrebling provision would not preclude the United States from applying its substantive rules to conduct in international commerce. Detrebling does not go to whether a foreign company or a U.S. company should do something; it goes to the penalty to be imposed if the company disobeys U.S. law (and perhaps complies with foreign law). This is a way to take care of the problem, not by addressing the substantive conflict over policy, but rather by addressing the enforcement mechanism used.

Fourth and finally, I would like to point out that in our view, at least, it is entirely possible that the detrebling provision in fact may help promote U.S. antitrust enforcement, rather than cut back on it. Right now, because of the problems that we, as well as the administration witnesses, have identified, a significant number of antitrust cases become political footballs in the international arena. That can only hurt our antitrust enforcement at the present time. Furthermore, right now, at least in some jurisdictions, we have an all-or-nothing proposition for the courts. The courts can either dismiss the action altogether because of foreign interests, or they can go forward, without restraint. The detrebling provision would allow U.S. courts to assert U.S. antitrust jurisdiction, and promote U.S. substantive antitrust interests, while ameliorating the conflict, stopping short of dismissal.

That concludes my comments. Thank you very much for the opportunity to appear today.

Senator **McConnell**. Staff informs me that we will submit some questions to you in writing, which we would like you to respond to for the record.

We want to thank you very much for coming.

Mr. **Campbell**. Thank you.

Mr. **Westin**. Thank you.

[Statement and additional material follow:]

Testimony on S.397, The Foreign Trade Antitrust Improvements Act of 1985,

by James S. Campbell and David Westin

Committee on the Judiciary, United States Senate

June 21, 1985

Chairman Thurmond and Members of the Committee:

We are pleased to appear this morning to testify in support of S.397, the Foreign Trade Antitrust Improvements Act, introduced by Senator Dennis DeConcini.

We are members of the firm of Wilmer, Cutler & Pickering of Washington and London, and we and our firm represent U.S. and foreign corporations that are or have been involved in antitrust proceedings in the United States and in Europe. Several of these proceedings have raised issues of precisely the kind addressed by S.397. Nevertheless, our testimony today is not on behalf of either our firm or any of its clients and should be understood to represent only our own personal views.

Introduction

Our testimony is in three main parts.

In the first section of our testimony we seek to provide the Committee with a concise overview of the principal features of the antitrust laws of the U.S. and its major trading partners. The purpose of this brief sketch is to identify the differences among national competition laws as to enforcement policy, enforcement mechanisms, discovery, and remedies that lead to international conflicts of the kind that S.397 seeks to avoid or ameliorate.

Next we refer to some of the actual conflicts that have arisen between the U.S. and its trading partners as a result of U.S. enforcement of its antitrust laws in international commerce. We discuss the U.S. government's increasing recognition of the principle of comity as an appropriate limitation on the exercise of its antitrust enforcement powers. We go on to point out, however, that private antitrust damage actions in international commerce have remained largely unrestrained by comity considerations and are now the principal cause of international tensions stemming from U.S. antitrust enforcement.

The final section of our testimony, after noting the obvious desirability of avoiding or minimizing conflicts arising from assertion of U.S. antitrust jurisdiction over international commerce and the substantial contributions that S.397 would make to this goal, addresses two concerns that have been raised about the approach of the bill: the extent to which it would have the U.S. make unreciprocated concessions to our trading partners, and the competence of the federal courts to undertake the sort of balancing anticipated in Section 3 of the bill. We note the various ways in which U.S. companies and the U.S. government would benefit both directly and indirectly from legislation such as S.397. We further suggest some of the principles that federal courts might be urged by Congress to follow in balancing U.S. and foreign interests. And we conclude with our view that S.397, although not necessarily the comprehensive solution for all international conflicts of jurisdiction, represents what we believe to be a major step forward.

I. National Competition Laws and International Conflicts: An Overview

S.397 is the first legislative effort to address the increasingly serious economic and political problems that arise from the private enforcement of U.S. antitrust law in the international arena. To understand how these problems arise, it is necessary to consider how U.S. antitrust compares with competition law and policy in other nations, both in its similarities and in its differences.1/

Although there is quite a list of nations having laws that nominally control restrictive business practices and protect free competition, only the United States, the European Economic Community (EEC), and the Federal Republic of Germany vigorously enforce their competition laws against conduct outside their borders. In the United States it is well settled that our antitrust law applies to conduct occurring anywhere in the world so long as it has direct, substantial, and reasonably foreseeable "effects" in our domestic market -- for example, by increasing prices paid by domestic consumers. Similarly, German competition law adheres to the principle of antitrust jurisdiction over foreign conduct based on effects in the domestic market, although it is only within the last few years that the principle has begun to be applied in practice. In the EEC, competition law is increasingly being applied extraterritorially either on the effects theory or on the theory that a foreign enterprise and its EEC subsidiary form a "single enterprise" subject to EEC jurisdiction.

The substantive competition laws of the three "activist" jurisdictions are broadly similar. In each jurisdiction it is ordinarily unlawful for business enterprises to form cartels that fix prices, limit production, or allocate customers. In each jurisdiction, competition law places some limits on the ability of enterprises to establish restricted distribution systems for their products and to exploit industrial property rights by restricted licenses. Each jurisdiction imposes special limitations on the ability of dominant firms to engage in conduct that disadvantages competitors. Finally, two of the three jurisdictions (the U.S. and Germany,

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1/ The discussion contained in this section of our testimony is based in part on materials previously submitted by us to the International Chamber of Commerce's Committee on Extraterritorial Application of National Laws chaired by our partner Dieter G. Lange of London, England.

but not the EEC) have systems for notification and review of proposed mergers.

The United States parts company with Germany and the EEC, however, when it comes to competition enforcement policy, enforcement mechanisms, discovery, and remedies. In the United States, competition law enforcement tends to be guided by principles of market economics and is largely unrelated to governmental policies designed to promote economic development. In Germany, market economics plays a substantial role in enforcement of competition law, but broad social and industrial policy concerns tend to have a greater influence than in the United States. In the EEC, as in most other jurisdictions, competition law enforcement is more affected by administrative discretion, less affected by principles of market economics, and often guided by considerations of industrial policy (in the EEC, for example, the desire to remove barriers to the creation of the "Common Market" and to strengthen key European industries). Some countries may formally or informally encourage cartels to rationalize industries suffering from overcapacity or other economic ills, and many nations will facilitate mergers and other industrial combinations believed necessary to strengthen the international competitiveness of important domestic industries. Even in such relatively pure antitrust jurisdictions as the U.S. and Germany, exceptions to competition law are sometimes made for arrangements, such as export associations or other collaborations among competitors, that are believed to be justified by considerations of national industrial policy.

The United States, Germany, and the EEC all provide for governmental enforcement of competition law, but the latter two jurisdictions rely far more heavily than the United States on governmental enforcement. In the EEC and West Germany, the primary enforcement mechanism is an administrative agency, with the courts having a judicial review function. Although German law allows actions by private parties, and although private rights of action under EEC law have been recognized in several EEC Member States, such private actions have so far been of minor importance. In the United States, in contrast, private actions by injured parties are regarded as an integral part of effective antitrust enforcement and, in certain instances, may be even more important than governmental action in ensuring compliance with antitrust requirements. Private antitrust actions have for many years outnumbered governmental actions by factors of ten to one or more: in fiscal 1984, for example, there were 1100 private antitrust actions filed in the federal district courts, as compared with 96 government civil and criminal antitrust actions.

Discovery and investigatory procedures in U.S. competition law actions are much more protracted and costly than the procedures employed in European jurisdictions. In particular, U.S. discovery in private actions intrudes much further into the internal operations of business enterprises than does the discovery associated with private competition law actions in European and other countries. Discovery in governmental enforcement actions in Europe can be quite invasive, as the EEC's well-known "dawn raids" illustrate, but such discovery is at least less protracted than many U.S. antitrust grand jury investigations. Moreover, EEC and German investigations in competition cases rarely compel the production of documents located outside the jurisdiction, while U.S. discovery frequently requires documents and even testimony from outside the United States.

Only the United States allows recovery of treble damages in private legal actions, which may be brought not only by individual plaintiffs, but also by persons suing on behalf of classes of allegedly injured parties. While some aspects of the treble damage remedy have become controversial in recent years, most commentators would probably agree with the judgment of the distinguished business economist Irwin M. Stelzer that the private treble damage remedy has contributed significantly to effective antitrust enforcement in the United States and needs only to be improved in certain respects, not drastically cut back or eliminated.[2] Another difference in the field of antitrust remedies is that although offenders violating EEC or German competition laws may be fined the equivalent of millions of U.S. dollars, only the United States treats violations of its competition laws as grounds for criminal fines or imprisonment of corporate officials responsible for the violation.

Differences between the United States and the "non-activist" countries concerning competition policy and enforcement are even more profound than those between the U.S. and either the EEC or Germany. Some countries' substantive laws are fundamentally different. Most countries apply their competition laws with more than a modicum of political and industrial policy leaven. Many of the procedural and remedial aspects of these countries' competition laws differ fundamentally from the United States. And to all of this is added the basic difference that these countries do not generally recognize -- either for themselves or for other countries -- the right to apply competition laws beyond a particular country's borders.

Because there are these differences among nations as to substantive competition norms, the scope of proper application for those norms, enforcement policy, enforcement mechanisms, discovery, and remedies, the application of its competition laws by one country to international transactions involving several countries can lead to conflicts that impair intergovernmental relations, impose costs on multinational business transactions, and interfere with the development of international trade and commerce. When the British, the French, or the Canadians perceive U.S. antitrust enforcement as selfishly thwarting their national economic policies, intruding into their governmental decision-making processes, or threatening their business enterprises with unjustified financial penalties, it is not surprising that they adopt political, economic or legal countermeasures that, if the U.S. persists, naturally intensify the conflict. The conflict, like all conflicts, imposes added costs on everyone concerned -- nations, corporations, individuals. As Secretary Shultz has said, "unless they are managed or mitigated by the community of nations, these conflicts of jurisdiction have the potential to interfere seriously with the smooth functioning of international economic relations that is essential to continuec global recovery."[3]

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[2] Stelzer lists the advantages of the U.S. private treble damage remedy as increasing the resources devoted to antitrust enforcement, making antitrust enforcement less subject to the attitudes of a particular administration in Washington, opening up the judicial system to small businesses with grievances not large enough to warrant governmental action, and deterring businesses from attempts to tamper with competitive markets. The principal disadvantage of the private treble damage remedy that Stelzer identifies is its tendency to encourage the costly proliferation of unmeritorious or even frivolous litigation. He suggests that this defect can be corrected by "a combination of greater willingness of judges to grant summary motions for dismissal and otherwise control these cases in their early stages, and increased use of the English system of imposing some costs on unsuccessful plaintiffs, and high costs on frivolous ones." Stelzer, "Procedures for Private Antitrust Enforcement in the United States," Second Oxford International Anti-trust Law Conference, September 12, 1983.

II. U.S. Antitrust Enforcement in International Commerce: Conflict and Comity

Since World War II the United States has aggressively promoted its antitrust program to the world at large. Given the differences between U.S. antitrust and the competition laws of other nations, that promotional effort was bound to lead to international conflicts. Writing in 1956, Nicholas deB. Katzenbach, then a Yale law professor, described the situation in the following terms: "Extension of anti-cartel policy to world trade is clearly an objective of American foreign policy that is shared, if at all, with only moderate enthusiasm and considerable qualification by most foreign governments. The gap is sufficient to be called a genuine conflict of policy, in method and degree if not always in ultimate objectives. Against the presumed benefit to consumers of competitive pricing and quality, and the protection ostensibly offered economically weaker competitors from 'unfair' practices, some nations weigh with skepticism the adjustments of their economies to the full force of competition in terms of the capacity to survive in the world market, the impact upon balance of payments, domestic price structure, and ultimately local employment and national self-sufficiency."[4/]

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[3] Shultz, "Trade, Interdependence and Conflicts of Jurisdiction" (Columbia, South Carolina, May 5, 1984), reprinted in 131 Cong. Rec. S2198-S2201 (Feb. 27, 1985).

The conflict of policy described by then Professor Katzenbach has indeed produced over the past 40 years a series of sometimes bitter conflicts with even our closest allies. A roughly chronological roll call of the most famous cases would include the following disputes:[5/]

1. 1947: Antitrust grand jury investigation of price fixing by newsprint suppliers led to diplomatic protests and enactment of Canadian provincial statute blocking production of business records in foreign courts.

2. 1951-60: Antitrust grand jury investigated world-wide production and market allocation agreement among U.S., British, and Dutch petroleum companies. Broad subpoenas to foreign companies and subsidiaries of U.S. companies led to British and Dutch orders not to produce documents to the U.S. court and a series of protests from British, Dutch, French, Italian, and Saudi Arabian governments. These protests, coupled with the difficult political situation in the Middle East, led U.S. to drop the criminal investigation and bring a civil case against U.S. companies alone.

[4/] Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances In Interstate and International Law, 65 Yale L.J. 1087 (1956).

[5/] Karl Meessen's recent article, a copy of which is submitted with our testimony, provides references for most of the disputes on our list. *See* Meessen, Antitrust Jurisdiction Under Customary International Law, Am. J. Int'l L. 783, 791-93 (1984). Other references and enlightening discussion are contained in Atwood & Brewster, Antitrust and American Business Abroad (2d ed. 1981).

3. 1952-55: In a civil antitrust action by the U.S. government challenging a market division agreement between duPont and ICI, relief ordered by the U.S. court that would have extinguished rights under British nylon patents was frustrated by the English court.

4. 1953: In considering relief in a government action attacking monopolization of the U.S. incandescent lamp industry, the court took into account U.S. and foreign non-antitrust economic interests in declining the government's request for divestiture of nine foreign subsidiaries of General Electric and in granting limited relief against a Dutch defendant, Philips, charged with dividing world markets with GE. Nevertheless, the prosecution of the Dutch company led the Netherlands to adopt blocking legislation in 1956.

5. 1954-65: In a U.S. Sherman Act prosecution of Swiss and American watch manufacturers and distributors for conspiring to suppress competition for Swiss watches, relief was partially modified to accommodate Swiss governmental interests.

6. 1958-62: U.S. government challenged a patent pool of Canadian radio manufacturers, many of whom were subsidiaries of U.S. companies, that prohibited licensing of Canadian patents to importers. Canadian government vigorously protested the U.S. assertion of jurisdiction over action of Canadian companies in Canada that had been encouraged by Canadian government. The United States settled for consent order against U.S. parent companies only (implicitly permitting Canadian subsidiaries to decide to continue pool arrangement) and agreed to hold consultations with Canadian authorities before proceeding against Canadian companies in the future.

7. 1960-61: Antitrust grand jury and Federal Maritime Commission investigated international shipping conference agreements setting joint rates. Documents were demanded from hundreds of U.S. and foreign companies. The governments of the United Kingdom, France, Italy, Denmark, the Netherlands, Germany, and several other nations filed formal protests with the Department of State. The U.S. court overseeing the grand jury restricted the criminal subpoenas by requiring exhaustion of all U.S. sources before documents could be sought from abroad; the failure of the FMC to curtail its demands for documents led to blocking statutes covering maritime documents being enacted in several countries, including the U.K., Germany, and Belgium.

8. 1970: Justice Department challenged the merger of two Swiss chemical companies, but settled so as to permit merger to go forward while avoiding anticompetitive effects in U.S. by requiring divestiture of their U.S. subsidiaries.

9. 1971-present: Private U.S. antitrust action against Japanese electronics products manufacturers, their U.S. subsidiaries, Sears, and Motorola seeks damages for alleged conspiracy to monopolize the U.S. markets by charging predatorily low prices, including participation in export control arrangements directed by the Government of Japan.

10. 1973-present: Private antitrust action by Timberlane, an Oregon partnership, charges a U.S. bank and its employees with conspiracy to destroy Timberlane's business of producing lumber in Honduras for export to the U.S. and elsewhere; in the leading decision applying the jurisdictional rule of reason, the court of appeals held that the interest of

Honduras in resolving the dispute under its laws outweighed the interest of the United States in applying the antitrust laws to the transactions in issue.

11. 1975-81: Antitrust grand jury investigated U.S., British, French, Canadian, Australian, and South African uranium companies participating in cartel encouraged by foreign governments to regulate excess supply of unenriched uranium. British, Canadian, and Australian governments protested, and the Justice Department proceeded only against a single U.S. defendant by obtaining a misdemeanor information to which the U.S. company pleaded _nolo contendere_ and paid a small fine. In follow-on civil actions against U.S. and foreign defendants by U.S. company forced to pay higher uranium prices, Canadian, Australian, British, and South African governments appeared and argued that their citizens should not be subjected to antitrust scrutiny by U.S. courts for actions the governments had encouraged. The Court of Appeals said that jurisdictional rule of reason was not the law in the Seventh Circuit and excoriated the foreign governments for supporting their nationals. The civil actions eventually settled; governments of Australia and Canada adopted blocking statutes, and Britain adopted law blocking production of evidence, refusing to enforce treble damage awards, and empowering non-U.S. companies to sue in England to recoup two-thirds of any treble damage award.

12. 1976-81: Unsuccessful U.S. criminal and civil antitrust actions charged a conspiracy to reduce New Mexico potash production organized by Canadian provincial officials seeking to reduce overproduction in Saskatchewan, thereby bolstering local economy and avoiding U.S. trade action against "dumping" of Canadian potash. A subsequent U.S. private antitrust

damage action by alleged Canadian victim of conspiracy was dismissed for lack of standing and the weak U.S. interest, compared to Canadian, in providing antitrust remedy.

13. 1978-79: Antitrust grand jury investigated North Atlantic shipping conferences involving shipping companies from the U.S., Germany, and Britain. After the governments of Germany, Belgium, France, the Netherlands, Sweden, and the United Kingdom protested, the investigation culminated in indictments against five companies and their executive officers and pleas of _nolo_ _contendere_ from each. A subsequent private action following on the indictments was ultimately settled for substantial cash payments, after the governments of Germany and Britain filed additional protests.

14. 1978-1982: Private antitrust action by a labor union against the OPEC nations for fixing crude oil prices was dismissed on the ground that the cartel was an "act of state" over which the U.S. courts should not exercise jurisdiction.

15. 1981-83: U.S. government initiated a civil investigation of charges that seven shipping companies (from the U.S., Germany, Britain, and several other countries) conspired to drive competitors from the market for shipping between the U.S. and Australia. The Government of Australia protested efforts by the Antitrust Division to obtain non-public documents concerning communications with the Australian government by the companies under investigation. The Australian and British governments both requested consultations with the U.S. over the investigation. A bilateral consultation agreement between the U.S. and Australia resulted.

16. 1982-present: Antitrust grand jury investigated allegations that airlines from U.S., Britain, Belgium, France, the Netherlands, Sweden, Switzerland, and Germany had conspired to drive Laker Airways out of business on the North Atlantic. After bilateral consultations and cooperation, the Justice Department found no basis for proceeding against all but the British carriers. Britain protested against any proceeding against British carriers alone, and President Reagan ordered the investigation dropped. The private action brought on behalf of Laker Airways continues despite reports that as a result the British Government has had to change its plans to privatize British Airways. The Court of Appeals has rejected the jurisdictional rule of reason as a means for resolving conflict between U.S. and English courts over jurisdiction.

A listing of this kind only begins to suggest some of the enormous costs that international conflicts over U.S. antitrust enforcement have imposed on the United States and U.S. business. One need only read the bitter denunciations of the United States by the British Parliament when the Protection of Trading Interests Act was passed or consider the recent threat to suspend low air fares on the North Atlantic to appreciate the level of recrimination that those conflicts have engendered. And even when these international conflicts do not reach the level of specific reprisals against U.S. business, they cast a pall over U.S. relations with some of its closest allies, often making it more difficult for the U.S. to promote its broader foreign policy goals. As Atwood and Brewster have noted:

> In recent years, almost every bilateral or unilateral meeting between economic officials of the United States and Western Europe has included some objection from the European side to United States antitrust

> enforcement. It has become also an almost an automatic agenda item in diplomatic meetings with Australians and Canadians.[6]

Moreover, these international disputes have cost the U.S. dearly by consuming enormous resources of government and business that could otherwise be put to productive use. Without suggesting that we are knowledgeable about the details of all of these extraordinarily complex, protracted disputes (even those in which we have been or are currently involved), we believe that the history of these conflicts leads to four important conclusions applicable to the legislation before the Committee.

First, we believe that the problem of international conflicts over U.S. antitrust enforcement has increasingly become one of private, rather than government, actions. In determining whether to prosecute, whom to prosecute, and what relief to seek, the U.S. government has come to recognize and largely adhere to the principle of comity -- the principle that a state should seek to accommodate the vital interests of other states whenever accommodation is not inconsistent with its own essential national interests. Evidence of recent U.S. recognition of comity as a restraint on antitrust enforcement may be found in the government's misdemeanor prosecution of only a single U.S. corporate defendant in the uranium cartel case; its relatively expeditious exoneration of the continental airlines and termination of the grand jury investigation of the remaining airlines in the Laker case; its entry into bilateral antitrust notification and consultation agreements with Germany, Australia, and Canada; and the repeated public statements of responsible officials to the effect that comity is recognized and foreign economic interests are taken into account in making antitrust enforcement decisions.

On the other hand, because private plaintiffs do not moderate their litigation tactics or objectives out of a concern for comity and facilitation of international trade, private antitrust enforcement is now a more serious cause of

[6] 2 Atwood & Brewster, *id*. at 101.

international conflict than governmental antitrust enforcement. As private antitrust enforcement in general has increased in volume and significance relative to governmental enforcement, so it has figured more importantly in creating international conflicts. An examination of the disputes on our chronological list above shows that in the earlier period it was governmental enforcement that was solely or primarily responsible for creating the conflict, while in the later era it was the private antitrust litigation component of the dispute that was responsible for most of the intensity of the conflict.

Second, the source of some of the most bitter international jurisdictional conflicts has been, not (or not merely) a difference over substantive competition policy, but rather the means by which the United States pursued its policy. Two aspects of U.S. antitrust enforcement have been particularly troubling to our trading partners: the availability of pre-trial discovery that is, by other countries' standards, extraordinarily broad and intrusive, and the availability of treble damages that are unique to U.S. competition law. We have referred to both these aspects of U.S. antitrust enforcement in the first section of our testimony.

Third, the history of international antitrust conflicts shows that U.S. antitrust enforcement authorities have failed to assume responsibility for bringing comity considerations to bear on the resolution of private antitrust litigation affecting foreign governmental interests -- even private litigation following on or encouraged by government grand jury investigations. The Department of Justice, notwithstanding its active participation as amicus in private antitrust cases raising important substantive legal issues, has been unwilling to appear as an amicus in private antitrust cases with international repercussions, even when requested to do so by affected private parties, or by the court itself (as in the private antitrust action against the OPEC cartel). These non-appearances have sometimes exacerbated the conflicts, as in the uranium litigation,[7] and have led to proposals by former Department officials that Justice appear as an amicus in cases where the court would benefit from Executive Branch assistance in balancing the relevant national interests.[8] We note in this regard that the bilateral antitrust agreements with Canada and Australia, mentioned above, require the Justice Department to report (upon request of the foreign government) to U.S. courts in private antitrust suits on any consultations or national interests relevant to the suit.

Fourth, we believe that history shows that U.S. corporations often bear the brunt of intergovernmental disputes over competition policy. In part, U.S. business suffers indirectly because of the disruption of international commercial opportunities caused by antitrust conflicts. Often, however, U.S. companies are immediately and directly affected by international antitrust conflicts. In nearly every dispute on our list U.S. corporations and their foreign subsidiaries became antitrust targets along with foreign-owned corporations, because all were engaged in competitive business conduct according to rules that were not being set exclusively by the United States.

Moreover, U.S. companies doing business abroad are increasingly being subjected to rigorous foreign laws without regard to U.S. law or policy, in part because the U.S. has failed adequately to take into account other governments' laws and policies in private antitrust cases. For example, the European Commission has enforced its construction of the competition provisions of the Treaty of Rome against U.S. corporations such as IBM and several wood pulp producers. In both these cases the U.S. government became involved through diplomatic channels to safeguard, in the one instance, IBM's incentives to innovate and, in the other instance, the statutory privilege of U.S. exporters to collaborate on marketing abroad. On the other hand, Germany recently refrained from barring an international merger of two cigarette companies altogether under its merger laws, while preventing anticompetitive consequences on German territory, by requiring divestiture of only one of the German subsidiaries of the companies. If we are to expect restraint such as that shown by Germany, rather than agressive enforcement such as that recently pursued by the EEC, we will have to show a reciprocal respect for comity in our own antitrust enforcement, private as well as public.

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[7] Cira, The Challenge of Foreign Laws to Block American Antitrust Actions, 18 Stan. J. Int'l L. 147, 270-71 (1983).

[8] Shenefield, Extraterritoriality and Antitrust - New Variations on a Familiar Theme, Remarks Before the International Law Institute and the International Law Section of the ABA, 19-21 (1980); Kestenbaum and Olson, Federal Amicus Intervention in Private Antitrust Litigation Raising Issues of Extraterritoriality: A Modest Proposal, 16 Int'l Law 587, 590-92. (1982)

III. S.397 As a Means of Resolving Conflicts Without Foregoing U.S. Interests.

Finally, let us turn to the provisions of S.397 and how they would help avoid or resolve the conflicts that have arisen from agressive private enforcement of U.S. antitrust laws with respect to international business transactions. The nature of each section of S.397 and how it would work in practice is set forth well in the section-by-section analysis introduced by Senator DeConcini when he first proposed the bill. As there described, the bill would authorize or require federal courts to consider the propriety of their exercising jurisdiction in international antitrust cases at an early stage of the proceedings on any of three specified grounds: the extent of likely effects of the challenged conduct on U.S. commerce, the comparative advantages of the conduct being challenged in proceedings brought in other countries (if such proceedings are available), and the relative interests of the United States and of foreign nations at stake in the dispute. If, based on such considerations, the U.S. court decides that it should exercise jurisdiction, then the bill would further authorize the U.S. court to ameliorate conflicts in appropriate cases by ordering that the action should go forward for only single, rather than treble, damages.

Given the nature of the conflicts we have described above, it seems obvious to us that the provisions of S.397 would enable U.S. courts to avoid unnecessary, counterproductive conflicts with our trading partners and allies as a result of over-zealous assertions of extraterritorial antitrust jurisdiction by private U.S. plaintiffs. We would like, therefore, to concentrate the remainder of our comments on responding to two possible concerns about S.397 that we believe arise largely from a misunderstanding of the nature of the bill and the problems it addresses: (1) that S.397 represents a unilateral relinquishment of U.S. interests without corresponding concessions by other countries; and (2) that the sort of "balancing" envisaged by Section 3 of S.397 is beyond what U.S. courts can reasonably be expected to perform.

A. Benefits to United States versus Benefits Abroad

No one sees disputes between the United States and its allies over application of antitrust laws to international business conduct as desirable. Everyone recognizes the harm such conflicts do to all parties involved -- both private and governmental -- and the concomitant need to avoid or minimize such conflicts insofar as is possible. At the same time, some are concerned that comity should be a "two-way street" in which the United States limits the exercise of its jurisdiction only in return for equivalent concessions by our trading partners. And U.S. business rightly says that steps taken to reduce tensions in international antitrust cases should not shift the onus of antitrust enforcement from a shared burden on U.S. and foreign companies to the shoulders of U.S. companies alone.

Our response to concerns such as these is two-fold. First, we do not understand S.397 to be intended merely to obtain indirect or long-term benefits for U.S. business by ameliorating international economic disputes. Quite the contrary, we understand that under a statutory provision like S.397

avoidance of conflicts with the interests of foreign sovereigns often will directly and immediately benefit U.S. businesses by leading to limitation on the exercise of U.S. private antitrust jurisdiction as to all parties -- U.S. and foreign alike. And, as noted above, U.S. parties have been involved in virtually every antitrust case giving rise to substantial international conflicts.

Indeed, based on our experience in these types of cases, there are certain ways that U.S. business could be expected to benefit more than its foreign counterpart. Take one practical example. In response to U.S. exercise of its antitrust jurisdiction in the uranium cases described above, the British Parliament in 1980 enacted the Protection of Trading Interests Act (PTIA). The PTIA includes a so-called "claw-back" provision, which empowers companies doing business in the U.K. -- other than U.S. companies -- to sue U.S. plaintiffs in England to recover two-thirds of any treble damage award collected from them in a U.S. antitrust case. The practical effect of this provision, when coupled with the joint and several liability of defendants under the U.S. antitrust laws, is to give plaintiffs a powerful incentive to seek to collect their treble damage awards from U.S. defendants alone, thereby avoiding the risk of subsequently losing two-thirds of their award under the British PTIA. This is but one example of the ways in which our present, largely unrestrained exercise of antitrust jurisdiction in private cases has placed U.S. companies in a worse position than their foreign counterparts. If such cases were de-trebled under S.397, of course, this disadvantage would be eliminated, as claw-back would not apply and plaintiffs would have no built-in incentive to concentrate their efforts on collecting judgments from U.S. companies.

There is a second and more basic response, however, to the concern that conciliatory steps such as S.397 would have the United States give up "something for nothing." The historic cause of each of the various blocking and other foreign statutes directed toward impairing the exercise of U.S.

jurisdiction has been the unrestrained exercise of that jurisdiction. The same pattern has been repeated in Britain, Canada, Australia, France, Germany, Belgium, and several other of our allies and traditional trading partners. A "unilateral" step taken to remove the cause of the problem could only be expected to lead to a commensurate reduction of the pressure from the other side. Indeed, in some cases such a quid pro quo would come automatically as a matter of law. (Several provisions of the British PTIA, for example, apply only insofar as the U.S. action is one for treble damages.) Someone, however, must take the first step in order to promote the interests of all -- private and governmental, U.S. and foreign. It simply makes sense that the U.S., as the leader of free market economies and as the immediate cause of the problem, should act first.

If, however, there remains some concern that enactment of S.397 would lead to an intolerable situation where a foreign country would seek simultaneously to take advantage of the provisions of the bill while invoking a blocking statute to keep from the U.S. court evidence critical to the determinations required by S.397, the ameliorative provisions could be linked explicitly to the waiver of applicable blocking statutes. We would suggest that, if the Committee considers this necessary, it be done by clarifying in the legislative history Congress' specific intent that U.S. courts should consider the international ramifications of the exercise of U.S. antitrust jurisdiction in private cases only to the extent that the relevant foreign countries interpose no barriers to the courts' obtaining the evidence necessary to assess the existence and weight of the governmental interests assertedly affected by the action. As we believe this is how the bill as now drafted would be applied by the courts, we see no need to incorporate such admonitions in the language of the bill itself.

B. The Courts' Competence To Balance

In addition to the concern that the United States might give away something for nothing to foreign governments and businesses, some have expressed concern that the sort of balancing of United States and foreign interests contemplated by Section 3 of S.397, the "jurisdictional rule of reason," is more than courts can or should be expected to do. This is an issue that goes far beyond the four corners of S.397 or even the antitrust laws generally, as we all are aware of the extent to which United States courts have been asked to decide major social issues that cannot be limited to strictly "legal" questions over the past few decades. But we believe that the concern, although an important one, is misdirected if applied to Section 3 of S.397 both because it misapprehends the sort of inquiry that Section 3 would require and because it overlooks traditional, "legal" work done by the courts for generations that is not different in kind from the balancing contemplated by this bill.

Section 3 of S.397 does not purport to provide the detailed rules of decision for federal district courts addressing difficult questions of international conflicts in private antitrust cases. Rather, it provides guidance to the courts on the methodology for developing such rules of decision. Thus, the bill nowhere states explicitly what types of foreign or United States interests are to be weighed or what weight is to be given them. We believe that this is wise. Just as the Sherman Act itself did not attempt to anticipate and catalogue every form of anticompetitive behavior that should be prohibited, similarly a statute setting up a framework for resolution of international conflicts over private antitrust enforcement should do no more than point the courts in the right direction. It will then be up to the courts, in the best of our common law tradition of deciding what is an "unreasonable" restraint of trade or what constitutes "reasonable care" or "proximate cause," to develop on a case-by-case basis over a period of time the general principles that will determine when and how foreign interests will warrant curtailment of private U.S. antitrust jurisdiction.

This is emphatically not to say, however, that Section 3 of S.397 mandates so little of a substantive nature that it is unneeded. Quite the contrary, there is a desperate need for Congress to establish a procedural framework for dispute resolution along the lines of Section 3, for at the present time much of the courts' energies are being directed to debating whether balancing of national interests is appropriate and, indeed, whether the courts have the authority from Congress to balance. As a result, very little attention is being given to the pressing task of developing a common law of conflict resolution. Section 3 of S.397 will put an end to that debate, and free the courts to get on with the job.

Although Section 3 by its terms is rightly open-ended with respect to the nature of the balancing process, it will be appropriate for this Committee, in putting together the legislative history of the provision, to give some initial guidance to the courts concerning the types of interests that Congress has in mind in mandating that a balancing be performed. Much excellent scholarly work has been done in this area, and we attach to our written testimony, in addition to Karl Meessen's superb article referred to earlier, a single example in the form of an illuminating Note that appeared recently in the Cornell Law Review. For our own part, we would make three modest suggestions for the Committee's consideration.

First, in considering the respective interests involved, the courts should look to governmental interests alone, putting aside all consideration of the private interests of the litigants or other private parties that might be affected by the antitrust action. It is the president of the foreign nation involved -- not the president of the corporation being sued -- whose viewpoint should be considered. To be sure, the line between public and private interests will not always be clear. The clearest case for considering an asserted interest to be governmental will be where the foreign government would have the same complaint about the U.S. antitrust action going forward irrespective of who were parties to the dispute; that is, where the primary concern is that a precedent not be established by the U.S. action that will determine the future course of business or other conduct within a foreign nation that is contrary to the way the government of that nation wishes its citizens (or those present in its country) to behave. At the other extreme, the mere fact that a citizen of a foreign country will have to pay substantial sums of money to a successful plaintiff should generally not be considered to be the sort of governmental interest that would weigh against exercise of U.S. antitrust jurisdiction. In between these extremes there will fall a wide range of circumstances in which substantial impairment of the activities of particular foreign companies or actors could rise to the level of a governmental interest as where, for example, an antitrust damage award and/or injunctive decree would severely harm an industry of critical importance to the economy or security of a foreign nation. In assessing each of the these situations, however, the courts should attempt to limit its consideration to those interests that can fairly be described as of importance to the foreign government in its role as sovereign.

Second, we believe that the strongest cases for deference to interests of foreign sovereigns will usually come in those situations where the conduct being challenged is consistent with established regulatory systems or policies of foreign nations. For example, in the shipping industry certain of our trading partners have determined in their capacity as sovereign states that their economic interests are best served through cartels designed to avoid the "boom and bust" cycle that has traditionally characterized ocean shipping. Although generally stopping short of compelling shipping companies to form such cartels, these nations have actively encouraged cartelization as a matter of government regulatory policy. For the United States unilaterally to impose its own, somewhat different view of how the international shipping industry should operate runs directly contrary to the governmental policies of our trading partners, as the Shipping Act of 1984 recognized. On the other hand, courts should view with substantial suspicion ad hoc assertions of foreign governmental policies that were not expressed and implemented before the particular U.S. antitrust challenge involved.

Finally, in applying the balancing test, courts should take great care to identify situations where the asserted conflict may be a "false" one so far as substantive law and national economic policy are concerned. As described above, the basic competition laws of many of our trading partners do not greatly differ from our own: Aside from the broader or narrower exceptions that various nations make for particular industries or particular transactions, many of the differences stem more from the unique enforcement mechanisms, discovery practice, and remedies associated with U.S. antitrust laws. Although sometimes there is an unavoidable conflict of substantive policy (as, for example, in the shipping cases discussed above), in many cases the foreign government will make no claim that it would condone the substantive, anticompetitive conduct involved. In cases such as these, the other provisions of S.397 provide much needed alternatives for the U.S. courts to use to ensure that the substantive goals of U.S. antitrust laws are pursued with minimal offense to objections of our trading partners based on U.S. enforcement mechanisms, discovery, or remedies.

For example, in cases where the foreign country has laws that appear to provide some appropriate relief for the plaintiff and the clear nexus of the case lies abroad, Section 4 of S.397 would require the U.S. courts to apply the traditional legal doctrine of forum non conveniens. For those cases where the objection of the foreign state is to the penal nature of the private U.S. action, rather than to the substantive competition rule being applied, Section 5 of S.397 would authorize U.S. courts to confine the relief requested to single rather than treble damages. Sections 2, 3(b), and 5(b) of S.397 provide that courts should try to resolve the jurisdictional and remedial questions at the threshold, before permitting the parties to engage in the kind of broad discovery that so many of our trading partners find objectionable.

Conclusion

As strong supporters of S.397, we cheerfully concede that it is not the ultimate solution to all of the problems that have arisen concerning the application of U.S. antitrust laws to international business transactions. The problems are too profound and complicated to be susceptible to any single, comprehensive solution short of a muitilateral treaty harmonizing all national competition laws and the procedures used to enforce them. That, however, is a dream for another age. The practical, real-world question before this Committee is whether S.397 is a substantial step in the right direction. We believe that S.397 combines the best of what can be done and what should be done. To reject S.397 simply because in an ideal world we could achieve a more global solution, or because one secretly supports some more radical proposal to restrict private U.S. antitrust enforcement affecting international commerce, would be to let the "best be the enemy of the good."

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ANTITRUST JURISDICTION UNDER CUSTOMARY INTERNATIONAL LAW

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I. *LAKER* VERSUS *TIMBERLANE*

When, on October 24, 1983, the U.S. District Court for the Northern District of California handed down its decision in *Timberlane Lumber Co. v. Bank of America* and denied U.S. jurisdiction out of regard for the Honduran "system of justice,"[1] there may have been some surprise that the case was still pending. The *Timberlane* decision of 1976 of the Court of Appeals for the Ninth Circuit,[2] which remanded the matter to the district court, had already become a classic, even though it was preceded by the 1968 decision in *United States v. First National City Bank* on the production of documents located abroad.[3] The *Timberlane* approach outlined by Judge Choy, under which the exercise of antitrust jurisdiction has to be restrained by a case-by-case analysis of various factors, was widely discussed (and usually praised) in legal writing,[4] and was also followed by federal courts of the Second, Third, Fifth, Ninth and Tenth Circuits.[5]

Even more recently, however, *Timberlane*'s role as the leading precedent has been seriously challenged by a decision of March 6, 1984: *Laker Airways Ltd. v. Sabena.*[6] There Judge Wilkey, writing for the majority of the U.S. Court of Appeals for the District of Columbia Circuit, not only upheld U.S. jurisdiction—which could very well have been reconciled with the *Timberlane* approach—but he went on and sought to demonstrate why *Timberlane* and some of its variants were not at all suited to give guidance in deciding the case under review. Judge Wilkey may be deemed to have thereby also expressed his views as one of the advisers of the American Law Institute on the forthcoming *Restatement of the Foreign Relations Law of the United States (Revised).* In fact, the present draft of the *Restatement* has incorporated the

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[1] Timberlane Lumber Co. v. Bank of America, 574 F.Supp. 1453 (N.D. Cal. 1983), *appeal pending*, No. 83-2008 (9th Cir. Oct. 26, 1983).

[2] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

[3] United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968).

[4] *See, e.g.*, John H. Shenefield (then Associate Attorney General), *Extraterritoriality and Antitrust—New Variations on a Familiar Theme*, 1981 TRADE REG. REP. (CCH) ¶50,424, at 55,961 *et seq.*; Gill, *Two Cheers for Timberlane*, 10 SWISS REV. INT'L ANTITRUST L. 3 (1980); D. ROSENTHAL & W. KNIGHTON, NATIONAL LAWS AND INTERNATIONAL COMMERCE 86 *et seq.* (1982). For a skeptical view, c.f., e.g., Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AJIL 257, 268 *et seq.* (1981).

[5] For references, see *infra* notes 73–75.

[6] Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1984).

Timberlane approach as a master principle of reasonableness in a general clause on prescriptive jurisdiction (section 403), which is also extensively referred to by provisions on adjudicative and enforcement jurisdiction (e.g., sections 431 and 443).[7]

Still another attempt to analyze the well-known problem of antitrust jurisdiction may be justified by the current efforts to restate the law on state jurisdiction and by these two contradictory decisions, which have brought the matter to a head. First, therefore, both the factual and the conceptual background of *Timberlane* and *Laker* will be summarized. In section II an outline of the strictly international law approach of this paper will be presented. Section III will contain a survey of the huge amount of state practice, here systematized exclusively for the purpose of ascertaining customary international law. In section IV, the author will explain why, in his opinion, state practice neither supports the assumption that *Timberlane*, or section 403 of the draft *Restatement*, constitutes a rule of international law nor permits the notion that conflicts of antitrust jurisdiction are entirely unregulated by international law, as is asserted in *Laker*. Instead, the author will suggest that international law does require a balancing, but only of state interests: under the balancing rule of noninterference, a state is prohibited from taking measures of antitrust law if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by those measures. Section V will conclude the paper with suggestions for improving the operability of the more narrow balancing rule advocated here.

1. Judicial Interest Balancing under Timberlane

Timberlane Lumber Co., a general partnership located in Oregon, made an investment in a Honduran lumber firm that had problems of liquidity and was excessively indebted to the Honduran branch of the Bank of America.[8] Timberlane's efforts to revive the operations of that firm failed. Bankruptcy proceedings followed. The bank, using the services of a Honduran national, allegedly managed to recover a good portion of its outstanding claims at the expense of Timberlane. Timberlane brought various lawsuits before Honduran and U.S. courts. The Honduran proceedings were later settled. In the United States, an unfair competition suit and three tort suits were dismissed on the ground of *forum non conveniens*. The U.S. antitrust suit was also dismissed, mainly on the basis of the act of state doctrine. The latter decision was then reversed, and the matter remanded by the Ninth Circuit in the famous *Timberlane* decision of 1976.[9]

Since the Honduran Government had not been directly involved in any of the alleged conduct underlying the antitrust claim, the court of appeals denied the applicability of the act of state doctrine. It held, however, that the presence of domestic anticompetitive effects would not automatically justify the assertion of U.S. jurisdiction in a given case. The effects test "fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country."[10] Therefore, an additional question should be examined: "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[11] Judge Choy then set up a nonexhaustive list of seven "elements to be weighed." The district court, in its 1983 decision, first, on the basis of the assertions of the plaintiff, found the domestic effects to be just above the waterline of the *de minimis* rule.[12] Then, applying the balancing rule, the court held that to reopen the case in the United States, after it had been extensively reviewed, under whatever circumstances, by Honduran courts, would cause embarrassment to a foreign state that, through a diplomatic note, had expressed its concern. Judge Williams summarized his reasoning as follows: "Respect takes many forms as this Circuit has admonished us. Regard for the codification of [Honduran] cultural, business and ethical mores, as well as the integrity of [the Honduran] system of justice, leads us inextricably to conclude that we need DISMISS these actions."[13]

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[7] RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) (Tentative Drafts No. 2, 1981, and No. 3, 1982).

[8] Timberlane Lumber Co. v. Bank of America, 574 F.Supp. 1453, *passim* (N.D. Cal. 1983).

[9] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, *passim* (9th Cir. 1976).

The starting point of the *Timberlane* approach is a novel perception of the problem: previously, it was assumed that a state has antitrust jurisdiction, without any further limitation, whenever a sufficient number of connecting factors (jurisdictional nexus) is present, i.e., factors such as place of conduct and effects that provide a link between the facts of the case and the regulating state. *Timberlane* does not purport to refine this general rule on jurisdiction. The proposition, rather, is that, even if those requirements are met, conflicts may occur in the individual case. Under an additional rule, the specific constellation of interests might then demand that the application of domestic law be restrained.

It is not easy to tell whether that rule is supposed to form part of international law or of conflict of laws. There is even some structural affinity to substantive antitrust law since, under U.S. antitrust law, a "rule of reason" seeks to restrain the application of seemingly strict law. In fact, Kingman Brewster, who prepared the ground for the *Timberlane* approach in his excellent study of international antitrust in 1958, spoke of a "jurisdictional rule of reason."[14] But he did not specify which field of law he was referring to. In section 40 of the *Restatement (Second) of the Foreign Relations Law* of 1965, the American Law Institute expressly vindicated the rule as one of public international law.[15] But not everybody agreed. Stanley D. Metzger, for instance, did not accept the proposition either *de lege lata* or *de lege ferenda*.[16] The courts, slowly starting to apply section 40 of the *Restatement*, could be interpreted as subscribing to the international law character of the rule assumed by the *Restatement*, but the discussion of the rule in *Timberlane* itself and elsewhere leaves some doubts.[17] The reasoning of the U.S. courts is more flexible and more policy-minded than could be expected if it were only a matter of applying a rule of international law. In the present draft of the new *Restatement*, the *Timberlane* approach, or rather the principle of reasonableness developed from that approach, is again assumed to be mandatory under international law.[18] It should be noted, however, that Andreas F. Lowenfeld, the associate reporter who drafted the sections on jurisdiction, views international law as including a "blend of public law, public international law, and private international law."[19]

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[10] *Id.* at 611–12. [11] *Id.* at 613.

[12] Timberlane Lumber Co. v. Bank of America, 574 F.Supp. at 1466 and *passim*.

[13] *Id.* at 1472.

[14] *See* K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, especially at 442 *et seq.* (1958).

[15] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §40 (1965); for the definition of the term "international law," see §1.

The ambiguity regarding the source of law has its parallel in the elusive contents of the rule. Brewster himself listed six factors that should be weighed by administrative agencies and judges.[20] Those factors presuppose rather complex value judgments and overlap considerably. Section 40 of the *Restatement (Second)* mentioned the "vital national interests of each of the states" as the first of a nonexhaustive list of factors and then covered points such as individual hardship, territoriality, nationality and possibility of enforcement.[21] In discussing section 40 of the *Restatement*, the courts have produced a definitive proliferation of factors to be considered, but when actually applying the rule, the courts have emphasized the comparison of state interests and the search for remedies compatible with the interests of both states. In the present draft of the new *Restatement*, the interests of foreign states can still be found on the list, but somewhat submerged in a wide spectrum of considerations as to whose relative weight no indication is given.[22]

2. *The* Laker *Perspective: Intergovernmental Negotiations*

The D.C. appeals court's decision of March 6, 1984 in *Laker Airways Ltd. v. Sabena* dealt with a conflict of British and U.S. antisuit injunctions regarding treble damage actions before U.S. courts.[23] The British firm Laker had started to offer regular transatlantic flights at tariffs considerably lower than those of the International Air Transport Association (IATA) airlines. In order to meet the rapidly increasing demand, it purchased additional planes from the

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[16] Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. REV. 7, 20 (1966).

[17] *See* notes 73–75 *infra*.

[18] RESTATEMENT (REVISED), *supra* note 7, §403, comment a (Tentative Draft No. 2); for the definition of the term "international law," see §101 and the Reporters' Note to that provision in Tentative Draft No. 1, 1980.

[19] Lowenfeld, *Public Law in the International Arena*, 163 RECUEIL DES COURS 311, 401 (1979 II); *see also* Lowenfeld, *Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe*, 75 AJIL 629, 638 (1981); Lowenfeld, Book Review, 95 HARV. L. REV. 1976, 1993 (1982) (reviewing K. BREWSTER & J. ATWOOD, ANTITRUST AND AMERICAN BUSINESS ABROAD, 2d ed., 1981).

[20] K. BREWSTER, *supra* note 14, at 446.

[21] RESTATEMENT (SECOND), *supra* note 15.

[22] RESTATEMENT (REVISED), *supra* note 7, §403(2) (Tentative Draft No. 2).

[23] 731 F.2d 909 (D.C. Cir. 1984).

McDonnell Douglas Corporation, a U.S. manufacturer. The price was to be paid in U.S. dollars. Laker's earnings, however, were mainly in pounds sterling. In 1981, when the rate of exchange of the pound against the dollar declined precipitously, Laker ran into difficulties. Allegedly, the competing IATA airlines used that moment for another price reduction, which was to be revoked after the hoped-for collapse of Laker. In February 1982, Laker was in fact forced into liquidation. It then filed treble damage actions against the IATA airlines, IATA itself and McDonnell Douglas before the District Court for the District of Columbia. The airlines reacted by applying for antisuit injunctions in Great Britain. Those injunctions—later to be vacated by a decision of the House of Lords of July 19, 1984[23a]—sought to enjoin Laker from continuing its treble damage suits in the United States. Laker's answer was to apply for U.S. antisuit injunctions enjoining the airlines from obtaining foreign antisuit injunctions directed against Laker's U.S. treble damage actions.

Affirming the issuance of such a preventive antisuit injunction, the court of appeals assumed that both the United States and the United Kingdom had antitrust jurisdiction, but it found no reason why, in that situation of concurrent jurisdiction, U.S. courts should yield to their British counterparts: neither U.S. law nor international law contained any evidence as to the existence of a rule of "paramount nationality" conferring priority on the British courts to decide upon the claims of their national; comity could guide the interpretation of domestic law regarding its extraterritorial reach, but, once U.S. antitrust law was shown to be applicable, there would be no room to decline or modify its application on comity grounds; finally, judicial interest balancing, as suggested by *Timberlane* and by section 403 of the draft *Restatement*, neither could nor should be engaged in, since the courts on both sides of the Atlantic had no choice but to follow the directives of the political branches of their respective states, however conflicting they might happen to be. Reconciliation of conflicting interests, therefore, was a problem to be solved exclusively by negotiations between the governments concerned.

The appeals court's comments on comity do not affect the *Timberlane* approach in view of the understanding of that term adopted by Judge Wilkey: his discussion and the citations he gave indicate that he saw comity as a concept of deferring to foreign legislative, administrative or judicial acts whenever such generosity is in accordance with domestic public policy.[24] In *Laker* deference would mean allowing Britain to decide when U.S. courts should, and when they should not, assume jurisdiction—a proposition that surely was not covered by that domestic policy concept of comity. If there is, as in *Laker*, a real conflict of interests, *Timberlane* would indeed require the balancing of all the interests involved in order to make a decision either for or against domestic jurisdiction, or in order to adopt some compromise solution that might not completely cover domestic policy interests. The courts would eventually have to deviate from the directives of the political branch and replace them with their own policy evaluation. Mainly, that prospect and several more technical problems involved in the assessment and evaluation of interests led Judge Wilkey to decline to engage in any judicial interest balancing. The international law aspect was dealt with in only one sentence of the 48-page opinion: "Additionally, there is no evidence that interest balancing represents a rule of international law."[25]

[23a] British Airways Bd. v. Laker Airways Ltd., [1984] 3 W.L.R. 413 (H.L.).

[24] 731 F.2d at 937–38 nn.102–105. *See also* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AJIL 280, 281 *et seq.* (1982). The German locus classicus is: 8 F. C. VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 28 *et seq.* (1849) (of course quoting Joseph Story).

Under domestic law, judicial interest balancing indeed raises the issue of the proper role of the courts within a constitutional system. In discussing that issue, the D.C. court of appeals followed up on feelings of disenchantment with judicial interest balancing already expressed by the Court of Appeals for the Seventh Circuit in the *Uranium* case: "and shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction. If [remanded], the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery."[26] But, reacting to complaints of foreign governments, the then Legal Adviser of the Department of State, Roberts B. Owen, transmitted a letter to the court whose concluding sentence reads: "It is our belief that in future proceedings in this and other cases, the courts should give due consideration to the views of interested foreign governments and take into account appropriate considerations of comity where there is possible conflict between the laws or policies of nation states."[27]

The theoretical basis for the D.C. appeals court's position was provided by Harold G. Maier. After having stated in an earlier article in this *Journal* that comity is not a rule of international law,[28] Professor Maier investigated the possible merits of judicial interest balancing.[29] He found none: U.S. courts gave foreign national interests "short shrift or ignored them completely." Only those foreign law policies were respected "whose purposes we approve," and domestic courts were generally not stimulated to balance "short term against long term interests."[30] Since balancing in his view usually ended up by giving preference to domestic interests; the claim of promoting international reconciliation was not met in reality. A greater service to conflict resolution would be rendered if courts openly applied domestic law, unless prohibited by a general rule of territoriality, etc., and left it to the executive branch to negotiate a settlement.

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[25] 731 F.2d at 950.

[26] *In re* Uranium Antitrust Litigation. Westinghouse Elec. Corp. v. Rio Algom Ltd., 617 F.2d 1248, 1256 (7th Cir. 1980). Similarly: Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F.Supp. 1138, 1148 (N.D. Ill. E.D. 1979). For a skeptical statement on courts' balancing foreign policy risks in the context of the "unitary business" principle in taxation, see Container Corp. of America v. Franchise Tax Board, 103 S.Ct. 2933 (1983), *reprinted in* 22 ILM 855 (1983).

[27] U.S. Dep't of State, Letter of the Legal Adviser to the U.S. Dep't of Justice, Mar. 17, 1980, forwarded to the Clerk of the U.S. Court of Appeals by a letter of the U.S. Dep't of Justice, Mar. 18, 1980.

[28] Maier, *supra* note 24, at 281.

[29] Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983).

[30] *Id.* at 590 and 593.

Professor Maier's article on interest balancing also appears to have had an impact on the Department of State, which may be reconsidering its position. As late as June 1982, the Legal Adviser, Davis R. Robinson, had recommended the rule of reasonableness for judicial application,[31] but on October 21, 1983, at a conference in Ottawa, he said:

> Furthermore, it is not possible to deal with the problem by prescribing a balancing of interests test to determine whether jurisdiction exists as is suggested by the proposed draft of the new *Restatement*. . . . This balancing of competing interests is best accomplished by that give and take that is the hallmark of diplomatic exchange. . . . Characterizing the issue as one of comity rather than one of law has significant advantages for the entire international community.[32]

II. THE INTERNATIONAL LAW APPROACH

The choice is between no rule (*Laker*) and a rule currently covering two pages of the draft *Restatement* (*Timberlane*). Taking a position in that controversy makes it necessary to define the terms of reference: the author entertains the old-fashioned view that international law and conflict of laws are two separate legal systems that should be distinguished as clearly as possible, even though, in deciding practical cases, rules of each system will often have to be applied cumulatively.[33] In this paper, only the international law aspect will be presented; thus, it will be left aside whether domestic rules of conflict of laws provide for additional limitations on domestic jurisdiction in conformity with international law, or whether they give specific statutory directives diverging from international law.

To date, international antitrust cases have only been brought before domestic courts. Those courts, of course, have to apply domestic law. International law is applicable only to the extent that domestic law so provides. Also, when a domestic court has to decide an individual case, it need not determine whether a certain rule is part of domestic law or of international law as long as it is satisfied that the rule exists. Before a domestic court, proof of the existence of a rule of unwritten law is brought by citing as many domestic precedents as possible. Again, it seems to be immaterial whether those precedents reflect customary international law or only domestic rules of conflict of laws. Thus, there seem to be good reasons to subscribe to Lowenfeld's preference for some blend of public law, public international law and private international law.[34]

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[31] Address of Davis R. Robinson, June 30, 1982, in Contemporary Practice, 76 AJIL 839, 843 *et seq.* (1982). *Cf.* also note 27 *supra* and accompanying text.

[32] Robinson, Conflicting Assertions of National Jurisdiction over Multinational Enterprises, Panel Presentation, Canadian Council on International Law, at 3–4, 10, 11 (Oct. 21, 1983).

[33] Meessen, *Völkerrechtliches Minimum und kollisionsrechtliches Optimum*, in FESTSCHRIFT FÜR F. A. MANN 227 (1977); Meessen, *International Law Limitations on State Jurisdiction*, in INTERNATIONAL LAW ASSOCIATION, EXTRATERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO (Seminar of May 11–12, 1983, forthcoming).

[34] *See* note 19 *supra*.

In international antitrust practice, however, there are cases where it does matter whether an assumed rule is one of international law or of conflict of laws. Domestic law may attribute a different rank to the two sets of rules. In Germany, for instance, rules of general international law prevail over any statutory law.[35] Similarly, within European Community law, secondary legislation enacted by organs of the Communities is void if it violates general international law.[36] And, on the level of relations between sovereign states, domestic rules of conflict of laws cannot, of course, be relied upon at all.

The two legal systems interact in the process of forming new rules of unwritten law. Rules of conflict of laws may be part of state practice and thereby contribute to the formation of customary international law, and rules of customary international law may be referred to when ascertaining or interpreting principles of conflict of laws. But, in contrast to reciprocal influences on the contents of new rules, their actual creation follows entirely different lines.

First, the emphasis in the creation of conflict-of-laws rules is on judge-made law. Domestic courts are easily accessible and may give regular guidance on the development of the law, whereas international adjudication is the exception rather than the rule. Customary international law is mainly formed by the—it is hoped, parallel, but usually divergent—practice of some 160 independent states, acting through their legislative, executive and/or judicial branches.

Second, the role of legal publicists in the creation of new rules is different as well. In conflict of laws, theoretical approaches may be conceived specifically for adoption into judge-made law. The function of scholars of international law offers less opportunity for creative thinking: they may compile and analyze state practice, but they cannot replace it with their own concepts.

Finally, the perspective for analysis is different, too. The perspective of conflict of laws lies within a state. It is directed to domestic interests, both public and private. Foreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity. The perspective of international law stands above the sovereign states. It demands neutrality vis-à-vis the interests of particular states and it implies that, in general, the interests of the individual have to be articulated by sovereign states.

These three differences should be kept in mind when state practice is surveyed and analyzed in the next two sections of this paper. They all derive from the same plain truth: domestic rules of conflict of laws make up part of one lawmaking system organized by one constitution and usually based on a broad consensus of values and interests. The decentralized making of international law does not enjoy any of those benefits and is therefore bound to offer a more modest yield of legal rules. But, as should also be remembered, modest answers of international law may often be supplemented by richer ones of conflict of laws.

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[35] *See* GRUNDGESETZ art. 25 (FRG).

[36] Meessen, *The Application of Rules of Public International Law within Community Law*, 13 COMMON MKT. L. REV. 485 (1976); Everling, *Sind die Mitgliedsstaaten der Europäischen Gemeinschaft noch Herren der Verträge?*, in FESTSCHRIFT FÜR H. MOSLER 173 (1983).

III. CONFLICTS OF ANTITRUST JURISDICTION

A survey of state practice regarding antitrust jurisdiction should be, if it is not to beg the question, problem-oriented rather than rule-oriented. But what is the problem of international law? The presence of a problem is most significantly indicated by adverse reactions of foreign states. A number of international antitrust cases led to such a second level of dispute between sovereign states, in addition to the primary level of domestic litigation between the antitrust agency and private parties or simply between private parties. Foreign reactions to the assertion of antitrust jurisdiction, such as blocking legislation, diplomatic notes and antisuit injunctions, reflect a perceived impairment of foreign interests and may indicate the violation of an existing or an emerging rule of international law.

In order to ascertain eventual rules of customary international law, the focus has to be on antitrust conflicts as evidenced by protests of foreign states. A detailed, systematic report of international antitrust cases, covering the diplomatic and business aspects as well, still needs to be written. It will not be written here. Instead, a bird's-eye view will be given on the assumption that most readers are familiar with the cases referred to. The idea, to paraphrase a German proverb, is to take a look at the forest again, after the individual trees have held the attention for so long. Finally, as in any summary, allowance must be made for some simplification.

1. When Do Conflicts Arise?

Applying the effects principle does not necessarily prompt adverse foreign reactions. The *Alcoa* decision, for instance, was received rather favorably abroad.[37] Foreign governments obviously expected their nationals to gain access to the U.S. market as a result of the antitrust proceedings. The history of international antitrust conflicts therefore did not start in 1945 when *Alcoa* was decided, but 2 years later: in *Canadian International Paper*, the United States proceeded against U.S. and Canadian firms for price fixing and other charges.[38] U.S. efforts to obtain evidence from Canada met with public criticism in Canada and were later answered by the enactment of the first two blocking statutes, in the Canadian provinces of Ontario and Quebec.

Since that time, U.S. assertion of antitrust jurisdiction has prompted protests in a number of cases: the most notable ones perhaps were the *Bulb*,[39] *Nylon*[40] and *Petroleum*[41] cases in the early fifties; the first series of *Shipping*[42] cases, and the *Swiss Watch*[43] and *CRPL*[44] cases in the late fifties and early sixties; the *Uranium*[45] case and another series of *Shipping*[46] cases in the seventies; and the recent warfare of antisuit injunctions in *Laker*[47] so far in the eighties. In the meantime, however, the United States has lost its monopoly as troublemaker on the international antitrust scene. Others have appeared or may be about to: the European Communities in *Dyestuffs*[48] and also in *IBM*,[49] Germany in the *Synthetic Rubber*[50] and *Cigarettes*[51] cases, and maybe even Canada, a complainant in so many antitrust disputes, which is now proceeding quite rigorously against foreign mergers under its Foreign Investment Review Act.[52]

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[37] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); as to the foreign response, see, e.g., Henry, *The United States Antitrust Laws: A Canadian Viewpoint*, 8 CAN. Y.B. INT'L L. 249 (1970); Blair, *The Canadian Experience*, in PERSPECTIVES ON THE EXTRATERRITORIAL APPLICATION OF U.S. ANTITRUST AND OTHER LAWS 65 (J. P. Griffin ed. 1979).

[38] *In re* Grand Jury Subpoenas Duces Tecum addressed to Canadian Int'l Paper Co., 72 F.Supp. 1013 (S.D.N.Y. 1947); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 163 *et seq.* (1968).

[39] United States v. General Elec. Co., 82 F.Supp. 753 (D.N.J. 1949), 115 F.Supp. 835 (D.N.J. 1953).

[40] United States v. Imperial Chem. Indus. Ltd., 105 F.Supp. 215 (S.D.N.Y. 1952); British Nylon Spinners v. Imperial Chem. Indus. Ltd., [1953] 1 Ch. 19 (C.A.), [1955] 1 Ch. 37.

Domestic effects were present in all those cases. Otherwise, the requirements of substantive antitrust law would not have been met. Sometimes the effects were rather faint under absolute standards (*Timberlane, Synthetic Rubber*), or at least in comparison to the effects produced elsewhere in the same case (*CRPL, Swiss Watch, CIBA-Geigy*[53]). With the exception of *Timberlane*, where a Honduran diplomatic note demonstrated some resentment, conflicts have only arisen when the claims were directed against foreign firms. But, in the United States, foreign firms have never been the only defendants. Domestic firms, either forming part of the same group or entirely independent ones, have been named as codefendants. They have been charged with being partners to the cartel agreement, merger transaction, etc., or, in the case of domestic subsidiaries, with being likely to alter their competitive conduct as a result of a foreign merger. In one case, the U.S. Department of Justice apparently planned to proceed against a merger between two Canadian firms, both of which had U.S. subsidiaries whose business was unrelated to the market in which anticompetitive effects of the merger were expected. After early representations by the Canadian Government, the Department of Justice dropped the plan.[54] Of course, foreign nationals have often been involved in such suits without causing any adverse reaction from the foreign state. The U.S. Supreme Court, as early as 1911 in the *American Tobacco* case, confirmed the right to bring an antitrust action against foreign defendants.[55]

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[41] *In re* Investigation of World Arrangements with relation to the Production, Transportation, Refining & Distribution of Petroleum, 13 F.R.D. 280 (D.D.C. 1952); *see also* SUBCOMM. ON MULTINATIONAL CORPORATIONS OF THE SENATE COMM. ON FOREIGN RELATIONS, MULTINATIONAL OIL CORPORATIONS AND U.S. FOREIGN POLICY, 93D CONG., 2D SESS. (Comm. Print 1975).

[42] *See, e.g.*, *In re* Grand Jury Investigation in the Shipping Industry, 186 F.Supp. 298 (D.D.C. 1960); May, *The Status of Federal Maritime Commission Shipping Regulation under Principles of International Law*, 54 GEO. L.J. 794 (1966); Lowenfeld, *"To Have One's Cake . . ."—The Federal Maritime Commission and the Conferences*, 1 J. MAR. L. & COM. 21 (1969).

[43] *See, e.g.*, United States v. Watchmakers of Switz. Information Center, 133 F.Supp. 40 (S.D.N.Y. 1955), 1963 Trade Cas. (CCH) ¶70,600 (S.D.N.Y. 1962), 1965 Trade Cas. (CCH) ¶71,352 (S.D.N.Y. 1965).

[44] *See, e.g.*, United States v. General Elec. Co., 1962 Trade Cas. (CCH) ¶70,342 (S.D.N.Y. 1962); Henry, *supra* note 37, at 263 *et seq.*; Davidson, *The Canadian Response to the Overseas Reach of United States Antitrust Law*, 2 CAN.-U.S. L.J. 166, 167 *et seq.* (1979).

[45] *See supra* note 26 and: *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation. *In re* Subpoenas Duces Tecum, 563 F.2d 992 (10th Cir. 1977); United States v. Gulf Oil Corp., No. 78-123 (W.D. Pa. filed May 9, 1978).

[46] *See, e.g.*, *In re* Ocean Shipping Antitrust Litigation, 500 F.Supp. 1235 (S.D.N.Y. 1980); G. SLETMO & E. WILLIAMS, LINER CONFERENCES IN THE CONTAINER AGE (1981).

[47] *Laker*, 731 F.2d 909 (D.C. Cir. 1984).

[48] ICI v. Commission, 1972 ECR 619.

[49] For a survey of the facts, see IBM v. Commission, 1981 ECR 2639, dismissing IBM's complaint against the formal initiation of administrative proceedings as inadmissible. On Aug. 2, 1984, those proceedings were suspended under a settlement whose terms, in the words of IBM's Chairman, John R. Opel, do not require IBM "to make significant changes in how [it does] business." Wall St. J. (Eur. ed.), Aug. 3, 1984, at 1.

[50] Kammergericht [KG, Berlin Ct. App.], Decisions I and II, Nov. 26, 1980, WIRTSCHAFT UND WETTBEWERB/ENTSCHEIDUNGSSAMMLUNG [WuW/E] OLG 2411 (1980) (Bayer/Firestone v. Bundeskartellamt [Federal Cartel Office, FCO]); Gerber, *The Extraterritorial Application of German Antitrust Law*, 77 AJIL 756 (1983).

[51] KG, Decision of July 1, 1983 (Morris/Rothmans v. Bundeskartellamt), WuW/E OLG 3051, *appeal pending*; Gerber, *supra* note 50.

[52] Dow Jones & Co. v. Attorney Gen. of Canada, No. T-1167-80 (Can. Fed. Ct. June 10, 1980), *aff'd* by Federal Court of Appeal (Toronto) (Mar. 20, 1981, apparently not published); Rugman, *Canada: FIRA Updated*, 17 J. WORLD TRADE L. 352 (1983).

[53] United States v. CIBA Corp., 1970 Trade Cas. (CCH) ¶73,269 (S.D.N.Y. 1970); P. ERNI, THE BASEL MARRIAGE: HISTORY OF THE CIBA-GEIGY MERGER (1979).

As regards elements of strict territoriality, e.g., place of anticompetitive conduct and location of the object of a merger, the situation is less than clear. There are cases in which proceedings were initiated without elements of strict territoriality, i.e., they were brought under the notorious effects principle. Some of those cases prompted foreign protests and may therefore be considered as indicative of possible violations of international law (*Bulb, Nylon, CRPL, Timberlane, CIBA-Geigy, Dyestuffs, Synthetic Rubber, Cigarettes*), whereas others have met with no reaction from foreign governments or a favorable one (*Alcoa, Timken, Industrial Investment, Swiss Bank, Murata*).[56] But there are also several important antitrust conflicts in which at least some elements of strict territoriality can be found: in the *Shipping* cases and in *Laker*, the prices allegedly agreed upon were related to traffic to and from U.S. harbors and airports. In *Canadian International Paper* and the *Petroleum* and *Uranium* cases, the complaints related to price fixing that also was to occur in the United States. Even in *Swiss Watch*, the court held that many acts had occurred in the United States.[57] Finally, *BOC International Ltd. v. FTC*, concerning a takeover of a U.S. firm by a British firm, had perfect territorial links and still prompted British protests.[58]

Foreign reactions have often focused on U.S. attempts to take evidence abroad (*Canadian International Paper, Petroleum, Shipping, Uranium*). Would it

[54] Bell (then U.S. Attorney General), *International Comity and the Extraterritorial Application of Antitrust Laws*, 51 AUSTL. L.J. 801 (1977); J. Davidow (then Director of Policy Planning in the Antitrust Division of the U.S. Dep't of Justice), Address at the Federal Bar Association, at 6 (Aug. 28, 1980).

[55] United States v. American Tobacco Co., 221 U.S. 106 (1911).

[56] *Alcoa*, 148 F.2d 416 (2d Cir. 1945); United States v. Timken Roller Bearing Co., 341 U.S. 593 (1951); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982); United States v. Swiss Bank Corp., 1942 Trade Cas. (CCH) ¶56,188 (D.N.J. 1941); Murata Mfg. Co., 96 F.T.C. 1116 (1980).

[57] United States v. Watchmakers of Switz. Information Center, 1963 Trade Cas. (CCH) ¶70,600, at 77,455 (S.D.N.Y. 1962).

[58] BOC Int'l Ltd. v. Federal Trade Comm'n, 557 F.2d 24 (2d Cir. 1977).

be possible to take that aspect as characterizing cases drawing foreign protests? The following two considerations suggest a negative answer. In the first place, the foreign state may decide whether to consent to the taking of evidence or not. Under the OECD Recommendations and under some bilateral agreements, states have even undertaken to provide each other with information necessary to bring an antitrust suit.[59] Inter-agency cooperation of that type has been practiced in many cases.[60] There the taking of evidence abroad did not entail any international conflict.

Furthermore, as regards the remaining few cases, one wonders whether the taking of evidence was the real reason for the conflict. Assuming that all the evidence necessary to bring the *Petroleum* or the *Uranium* case was located in the United States, would the foreign governments then have acquiesced in the U.S. proceedings? Probably not. Objecting against the taking of evidence apparently constituted an effective first line of defense against the commencement of highly undesired antitrust proceedings. Also, in *Uranium*, if the U.S. subpoena on taking evidence abroad was the only concern of Britain and Canada, one may ask why that grievance was not removed by giving effect to the letters rogatory.[61]

In recent years, foreign protests have focused on treble damage cases. Would it be possible to isolate those cases and regard them as a distinct group always prompting adverse reactions? Indeed, so far, foreign governments seem to have reacted whenever one of their nationals was exposed to a treble damage claim (*Shipping* case of the 1970s, *Uranium, Laker*). But would they have refrained from objecting if the plaintiffs had contented themselves with claiming nothing but their actual damages? There may be less inclination to incur the expenses of bringing such a claim. But if it succeeds, the restrictive business practices found by the court would have to be discontinued, and foreign governments favoring these practices would still intervene.

All attempts to identify simple criteria for determining the situations in which antitrust conflicts arise have failed. Sir Ian Sinclair, the former Legal Adviser of the British Foreign and Commonwealth Office, made the following observation: "But if no attention is paid to reasoned objections to the reach of U.S. economic laws it ought not to occasion surprise if those governments whose trading interests are adversely affected by the extraterritorial application of those laws take the necessary steps to protect those interests."[62] Sir Ian was right. The crux of the matter is adverse effect on foreign interests. Formal criteria, such as territoriality, may help to define situations in which foreign interests are likely to be affected. But whether they are adversely affected would depend on how the foreign government happens to view its interests at any given moment—a matter that surely escapes any prior description in abstract terms.

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[59] For a text of the instruments and a survey of practice, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], COMPETITION LAW ENFORCEMENT (1984).

[60] *Id.* at 69.

[61] *But see* Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] 1 All E.R. 434 (H.L.); Gulf Oil Corp. v. Gulf Canada Ltd., 1980-1 Trade Cas. (CCH) ¶63,285 (Can. Sup. Ct. 1980).

[62] Sinclair, *Responses to Extraterritorial Exercises of Jurisdiction: The Diplomatic Response,* in EXTRATERRITORIAL APPLICATION, *supra* note 33.

2. *Patterns of Conflict Solution*

During the first two decades of antitrust conflict, control rested exclusively with the domestic government, which took the initiative in bringing a criminal or civil case and then responded to foreign governmental protests by defending its position, by working out a compromise or by yielding to foreign interests entirely. Such solutions were negotiated between the domestic government and the respective foreign governments, which, of course, proceeded in close contact with their nationals. As a result of such negotiations, the U.S. Government discontinued antitrust suits (*Petroleum, Uranium*), dropped plans for future actions (*Petroleum*), accepted limitations in orders on remedies (*Bulb, Nylon*) and agreed to a settlement incorporated in the final decree (*Petroleum, CRPL, Swiss Watch*). Since the mid-sixties, while governmental settlements have gradually shifted to the early stage of preliminary investigations, the courts have assumed a more active role. Section 40 of the second *Restatement*, which was promulgated in 1965, provided the legal basis. The need for the involvement of the judiciary resulted from the increasing share of private litigation in international cases. The Government took an interest in those cases and exchanged views with foreign governments, but it had no control. Reconciliation of domestic and foreign interests, if necessary, had to be worked out by the courts, to which, under an instruction originating in the U.S. Supreme Court, foreign governments had to present their views directly by way of amicus briefs.[63]

This complexity of techniques of settlement is matched by the diversity of results achieved. For example, in *Canadian International Paper*, the Canadian Government appears to have reluctantly accepted the U.S. position; only afterwards, as a result of public criticism, were the first two blocking statutes enacted.[64] As for the British protest in the *Dyestuffs* case, it had no effect at all. Both the Commission and the Court of Justice of the European Communities proceeded in that case without any reference to the countervailing interests of Great Britain (or of Switzerland, some of whose dyestuffs producers had also been involved).

In some cases, the foreign states completely or nearly completely had their way: in *Timberlane* and *Synthetic Rubber*, the decision to renounce domestic jurisdiction has to be seen in the light of the relative insignificance of domestic anticompetitive effects. In the *Petroleum* case, the U.S. position was watered down to such an extent that, in 1975, a member of the Department of Justice described the outcome as follows: "I believe that the consent decrees accomplished very little, if anything. They were cosmetic, and nothing more than that, in my opinion, so that the same power structure and the same joint arrangements between companies which should be competing exist today as existed then."[65] In that case, of course, the anticompetitive effects within the United States were by no means close to the *de minimis* rule. Apparently, however, the consideration accorded to the countervailing interests of foreign states was supported by a change of mind of the U.S. Government, which increasingly viewed its interest in competition policy as being overshadowed by national security interests.[65a]

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[63] U.S. Dep't of State, Circular Note to Chiefs of Mission in Washington, D.C., Aug. 17, 1978, Contemporary Practice, 73 AJIL 124 (1979).

[64] 72 F.Supp. 1013 (S.D.N.Y. 1947).

[65] SUBCOMM. ON MULTINATIONAL CORPORATIONS, *supra* note 41, at 74.

Most frequently, some sort of compromise was worked out, not exactly halfway, but somewhere between the extreme positions assumed by each side at the beginning of the proceedings: the orders on remedies in the *Nylon* and *Bulb* cases were not all that rigid, since saving clauses in favor of foreign law were included. The settlement in the *CRPL* case appears to have allowed Canada to continue its policy of building up its own radio and TV industry. In the *Swiss Watch* case, the United States gave up its original intention of dissolving the Swiss cartel completely. The final judgment was limited to some of the effects of the cartel on the United States. In the *Shipping* case of the sixties, the compromise was rather close to the U.S. position, but at least the criminal actions were dropped. *Uranium*, on the other hand, was more in favor of the foreign defendants since the settlements did not provide for payments in any way comparable to the sums originally claimed. Divestiture of a product line rather than a subsidiary of either side in *CIBA-Geigy* was another compromise. It allowed the foreign parents to proceed with the merger. In the German *Cigarettes* case, the Kammergericht made it clear that the foreign transaction between the Rembrandt Group and Philip Morris would not be challenged, although the combination of the two German subsidiaries resulting from that transaction continued to be prohibited.

It is not possible to summarize the survey of settlements reached in one or two meaningful, and at the same time accurate, sentences, but one observation may be made: all the cases were settled according to their own merits; that is to say, they were not included in package deals comprising completely unrelated issues that happened to be pending between the states concerned.

3. *Conflicts Avoided*

Avoidance of conflicts is preferable to conflict solution. Avoiding conflicts may, at least in part, reflect a desire not to come anywhere close to violating international law. A survey of the practice regarding different techniques of conflict avoidance suggests the following three observations.

First, the type and the number of connecting factors were chosen so as not to impair interests of foreign states. That concept is employed by states that assume antitrust jurisdiction only if there are both anticompetitive effects and elements of conduct within the domestic state. But territoriality, as the above cases demonstrate, has not always worked. And, had the scope of domestic jurisdiction been fully exhausted in practice, it would have caused many more serious conflicts. Under the effects principle, conflicts have been avoided by complying with the *de minimis* rule. For instance, no anticompetitive effects within the United States were present when the Conservation Council of Western Australia sued Alcoa for environmental problems caused by Alcoa's plants in Australia.[66] Similarly, the Court of Appeals for the Second Circuit found that no anticompetitive effects within the United States were caused when the Interbank Card Association excluded the National Bank of Canada from retaining a license for the Master Charge credit card in Canada.[67]

[65a] Notwithstanding independent grounds of substantive law, the settlement of the European *IBM* case (*see supra* note 49) might be seen in parallel to the outcome of the *Petroleum* case.

[66] Conservation Council of W. Australia, Inc. v. Aluminum Co. of America, 518 F.Supp. 270 (W.D. Pa. 1981).

Second, as an instrument of conflict avoidance, administrative restraint is more important than the choice of connecting factors. In Germany, the Federal Cartel Office managed to avoid any open conflict up to the *Synthetic Rubber* case of 1980, although German law had adopted the pure effects principle as of 1958. In many U.S. and German cases, there seem to have been early contacts with interested foreign governments.[68] As a result, the agencies in charge changed their plans considerably or dropped them entirely. Also, the Commission of the European Communities conceded in its *Eleventh Report on Competition Policy* of 1982 that it was prepared to take account, if possible, of really important and harmful effects on foreign states.[69] Lenient enforcement practice in general, and especially towards foreign enterprises, has played an important role in the Swiss record of subscribing to the effects principle and still never having caused an international antitrust conflict.[70]

The third conclusion drawn from state practice is that even when domestic antitrust law was both theoretically applicable and actually to be applied at the request of the Government and/or private parties, U.S. courts have adopted the practice of resorting to countervailing principles and, on that basis, of declining to apply domestic law in part or entirely. Restrictive practices instigated by foreign governments have sometimes been deemed not to be covered by domestic substantive law.[71] Or they have been held to be exempt from the operation of domestic law under the act of state doctrine and/or the foreign government compulsion defense.[72] Finally, often after discussing one or more of the aforementioned principles, a number of U.S. courts have adopted the balancing approach under section 40 of the *Restatement (Second)* and/or under *Timberlane*. The courts have thus demonstrated that, if warranted by the facts of the case, they were prepared to deny U.S. jurisdiction in order to avoid an international antitrust conflict. Actually, U.S. jurisdiction was upheld in two *Uranium* decisions and in the three pre-*Timberlane* cases under section 40 of the *Restatement.*[73] But in *Timberlane* itself, in a third *Uranium* decision and in *Montreal Trading*, the balancing of interests led the courts not to exercise U.S. jurisdiction.[74] In three further cases, the question was reserved for later decision, and two cases were terminated without engaging in balancing, though, in principle, the rule was held to be applicable.[75] To be sure, in *Laker* U.S. jurisdiction was again upheld, but there the court had declined to adopt the balancing approach.

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[67] National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); *see also* Crane Fruehauf Ltd. v. Fruehauf Corp., 1977-2 Trade Cas. (CCH) ¶61,708 (S.D.N.Y. 1977).

[68] For statements of administrative policy, see, e.g., Shenefield, *supra* note 4; Markert, *Die Anwendung des Gesetzes gegen Wettbewerbsbeschränkungen*, in ZEHN JAHRE BUNDESKARTELLAMT 205 (1968); Markert, *Die Anwendung der deutschen Fusionskontrolle (§§23 ff. GWB) auf Zusammenschlüsse mit und zwischen ausländischen Unternehmen*, in SCHWERPUNKTE DES KARTELLRECHTS 1980/81, at 91 (1982).

[69] COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY, No. 37 (1982).

[70] Haymann, *Extraterritorial Application of Antitrust Law, the Swiss Approach*, 12 SWISS REV. INT'L ANTITRUST L. 17, 24 *et seq.* (1981).

[71] Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. 1291, 1298 (D. Del. 1970); United States v. AMAX Inc., 1977-1 Trade Cas. (CCH) ¶61,467, at 71,798 (N.D. Ill. E.D. 1977).

[72] Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F.Supp. at 1298 *et seq.*; Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F.Supp. 92, 110 (C.D. Cal. 1971); International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354 (9th Cir. 1981).

IV. EVALUATION OF STATE PRACTICE

Jurisdictional rules of international law could provide for a basis of state jurisdiction. And, if two or more states have a basis for jurisdiction regarding the same matter, such rules could regulate the exercise of concurrent jurisdiction.

A basis of jurisdiction could be derived from rules allocating the facts of a case to one or more states according to the presence of certain connecting factors, such as place of conduct or nationality. If those minimum requirements of domestic contacts were not met, states would be prohibited from assuming jurisdiction. That type of general rule will be discussed in subsection 1 below.

The content of the rules governing the exercise of concurrent jurisdiction need not be established solely by reference to the facts of the case. It might be required that additional considerations, such as the attitude of the various states having a basis for jurisdiction, and possibly the interests of individuals, be taken into account. The legal consequences of such rules could be more complex than those on the basis of jurisdiction. Instead of either granting or denying jurisdiction, modifications of domestic law, e.g., as regards remedies, could be called for. The focus of subsections 2 through 4 will be on that second type of jurisdictional rule of international law.

1. Minimum Requirement of Enlightened Self-Interest

Is it necessary again to deal with the proposition that, in case of antitrust jurisdiction, a principle of territoriality sets a minimum requirement for domestic contacts? State practice contains cases in which no elements of strict territoriality were present: sometimes conflicts occurred, sometimes not. More importantly, many cases in which requirements of territoriality were met developed into international conflicts all the same. It is also not established that a state intending to exercise antitrust jurisdiction ever refrained from doing so on the assumption that it lacked the necessary basis for jurisdiction under an international law principle of territoriality. To be sure, Great Britain has fairly consistently objected to the exercise of antitrust jurisdiction by foreign states unless based on territoriality. Exceptions such as *Alcoa* have been mentioned. But one wonders whether such protests really reflected the assumption that an obligation existed under international law. If so, one would not expect the United Kingdom to have adopted connecting factors in its own law on merger control that would perfectly cover the American *CIBA-Geigy* case.[76] There, a merger between two Swiss firms was challenged on the ground that it would terminate competition between the U.S. subsidiaries of the parties to the merger. The principle of territoriality is not the sole basis for antitrust jurisdiction,[77] nor is it a secure basis since it must be combined with domestic effects, and even then international conflicts have arisen from time to time.

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[73] *In re* Uranium Antitrust Litigation. Westinghouse Elec. Corp. v. Rio Algom Ltd., 480 F.Supp. 1138 (N.D. Ill. E.D. 1979), 617 F.2d 1248 (7th Cir. 1980); United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); Joseph Muller Corp. Zurich v. Société Anonyme de Gérance et d'Armement, 451 F.2d 727 (2d Cir. 1971); American Indus. Contracting Inc. v. Johns-Manville Corp., 326 F.Supp. 879 (W.D. Pa. 1971).

[74] Timberlane Lumber Co. v. Bank of America, 574 F.Supp. 1453 (N.D. Cal. 1983); *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation. *In re* Subpoenas Duces Tecum, 563 F.2d 992 (10th Cir. 1977); Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981).

[75] Dominicus Americana Bohio v. Gulf & W. Indus., Inc., 473 F.Supp. 680 (S.D.N.Y. 1979); Zenith Radio Corp. v. Matsushita Elec. Indus. Ltd., 494 F.Supp. 1161 (E.D. Pa. 1980), 513 F.Supp. 1100 (E.D. Pa. 1981); Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (developing a balancing test similar to that in *Timberlane*, settled on remand). For a short obiter dictum, see National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981).

If territoriality is not the rule, could it be the effects principle? The effects principle has two distinct advantages:[78] it expresses the main concern of any state enacting antitrust laws, which is to establish a specific type of economic order and to defend it against adverse influences no matter where they originate and by whom they are caused. Also, antitrust jurisdiction has never been assumed without at least the arguable presence of direct, substantial and foreseeable anticompetitive effects. The problem is that asserting the effects principle as a rule of international law gives little comfort to any of the critics of antitrust jurisdiction. Such a rule would simply state the obvious. Furthermore, recent developments indicate that another problem may come up in the future. In 1980 the General Assembly of the United Nations adopted by unanimous resolution a restrictive business practices code that goes one step further than the effects principle.[79] Restrictive practices have to be prosecuted whenever they impair "international trade and particularly the trade and development of the developing countries." Under that provision, domestic effects are not necessarily required. The object of legal protection is expanded.

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[76] United States v. CIBA Corp., 1970 Trade Cas. (CCH) ¶73,269 (S.D.N.Y. 1970); *cf.* §64 *et seq.* of the British Fair Trading Act 1973, ch. 41; for an interpretation of those provisions, see V. Korah, Competition Law of Britain and the Common Market 63 *et seq.* (1982).

[77] Nearly undisputed since the New York resolution of the International Law Association; *see* Report of the 55th Conference, at xix (1972). *See also* 57 Institut de Droit International, Annuaire 338 (1978). For a differing approach, see Mann, *Staatliche Aufklärungsansprüche und Völkerrecht*, in Festschrift für H. Mosler, *supra* note 36, at 529, 533 *et seq.*

[78] For a detailed argument in favor of the effects principle leaving room, however, for future changes, see K. Meessen, Völkerrechtliche Grundsätze des internationalen Kartellrechts 108–72, especially at 155 (1975).

[79] GA Res. 35/63 (Dec. 5, 1980), adopting the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, UN Doc. TD/RBP/CONF/10 (May 2, 1980), *reprinted in* 19 ILM 813 (1980); *see* especially sec. E(4). *Cf.* also UNCTAD, Report of the Inter-governmental Group on Restrictive Business Practices on its Second Session, Held at Geneva from 21 to 30 November 1983, UN Doc. TD/B/RBP/16.

To substitute a principle of universality for the effects principle may not be wise antitrust policy. But would it violate international law?

No specific connecting factor, or set of such factors, appears to be regarded as binding. There was no sense of obligation when the United States first adhered to the principle of territoriality in *American Banana*;[80] there is none regarding the effects principle as developed since *Alcoa;* and even if the restrictive business practices code is followed one day in practice, it could later be replaced by a new combination of connecting factors resulting from different policy goals. Thus, each state's regulatory interests seem to set the minimum requirement for a basis of antitrust jurisdiction.

The foregoing conclusion is not entirely tantamount to denying the existence of any rule of international law regarding the basis of jurisdiction: a state may not determine its regulatory interests in "splendid isolation." There are other states that may be affected and that may, in the future, enact similar laws affecting the former state. A general sense of reciprocity therefore suggests that jurisdiction be asserted only when it is really necessary to reach the respective regulatory goals. The circumstances under which jurisdiction is claimed must be consistent with the state's regulatory goals. In selecting those goals, states are practically free, but they are bound to observe requirements of necessity and of consistency when they delimit the international scope of application of the laws designed to fulfill the goals they have selected. Thus, the choice of connecting factors is not a matter of absolute discretion. At least, it has to reflect some kind of enlightened self-interest.[81]

Such a principle of enlightened self-interest constitutes the common denominator of the practice of international antitrust regarding the basis of jurisdiction. In initiating antitrust cases, states have always followed their self-interest. Some "enlightenment" has been provided by limitations, mainly resulting from judicial practice, that require, for instance, direct, substantial and foreseeable effects. Indeed, it would not make sense for a state that has adopted the effects principle in its domestic law to apply its antitrust law when those requirements for domestic effects have not been met. Courts, therefore, have been right in occasionally denying the applicability of domestic law under the *de minimis* rule. In the *Cigarettes* case, the Kammergericht followed a similar line of reasoning when it deduced from an international law principle of necessity that the rule of German law explicitly requiring the prohibition of the entire merger was not applicable to mergers between foreign enterprises.[82] It would have been preferable, however, if the Kammergericht had based its restriction of the prohibition order on a more flexible conflict-of-laws approach.

Within the general theory of jurisdiction, F. A. Mann's concept of "reasonably close contact" has to be credited with having overcome the rigidities of the principle of territoriality.[83] As regards antitrust law, however, Professor Mann turns back to territorial criteria—in the view that only that type of contact is reasonably close, if international friction is to be avoided.[84] He dismisses the effects principle and would probably also dismiss the validity of the principle of enlightened self-interest. But in establishing rules of customary international law, even fear of international friction is no substitute for the normal test of state practice. Furthermore, a broad general rule on the basis for jurisdiction that sets few limits on state practice may very well correspond to a really trenchant rule on the exercise of jurisdiction. State practice regarding the basis of jurisdiction mainly consists of voluntary acts of self-limitation, whereas recurring patterns of bilateral conflict have indeed produced a more substantive rule on the exercise of antitrust jurisdiction, as will be demonstrated below. That rule purports both to be in accordance with state practice and to be capable of solving the problems that rightly were the concern of F. A. Mann and others.

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[80] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[81] K. MEESSEN, *supra* note 78, at 171–72 ("wohlverstandenes (Eigen-) Interesse").

[82] KG, Decision of July 1, 1983, *supra* note 51.

[83] Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 49–50 (1964 I).

2. *Under International Law: Neither* Laker *nor* Timberlane

The situation has to be faced: in antitrust cases containing foreign elements, concurrent jurisdiction is the rule rather than the exception. Concurrent antitrust jurisdiction, moreover, rarely results from cases in which each state can claim a different basis for jurisdiction. Usually, two or more states can rely on effects and on some elements of strict territoriality at the same time. Understandably, state practice has not yet resulted in consistency on jurisdictional priorities such as "paramount nationality." Thus, if there is to be a rule on concurrent jurisdiction, it will have to be closely related to the particular facts of the case.

According to *Laker*, "there is no evidence that interest balancing represents a rule of international law."[85] The court's reasoning, however, does not really contradict the assumption of such a rule. The wealth of state practice since 1947 has left no trace in the opinion of the D.C. court of appeals. Judge Wilkey's preoccupation was with the courts' role in balancing policy interests, an issue relevant under domestic law but not under international law. International law mainly prescribes obligations binding upon sovereign states. It always leaves undecided which branch of government should ensure compliance with those obligations. An international law rule requiring some balancing of interests could therefore be assumed to exist independently of whether, within the domestic legal system, it would have to be applied by the judiciary and/or the executive branch. Furthermore, if such a rule were assumed to exist, the domestic law problem would have to be seen in a different light. The U.S. Court of Appeals for the D.C. Circuit, if confronted with a rule of international law, would either have to apply that rule or to expose the United States to the risk of a claim under the international law of state responsibility. At this point, it may be added that even the *Laker* opinion reflects considerable sensitivity towards international implications, especially where Judge Wilkey stresses the need for intergovernmental negotiations.

Except for the reference to section 40 of the *Restatement (Second)*, *Timberlane* was also decided on grounds of conflict of laws. Judge Choy neither discussed state practice nor himself claimed the rule he stated to be one of international law. But his conclusion could happen to coincide with international law, as is now asserted in the draft *Restatement.*

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[84] *Id.* at 104 *et seq.*; and Mann, *supra* note 77, at 555 *et seq.*

[85] *Laker*, 731 F.2d at 950.

Is *Timberlane* (or reasonableness) supported by state practice? From the bird's-eye perspective that has been taken in reporting state practice, it could very well be concluded that the outcome of most international antitrust conflicts, perhaps of all of them, reflected the multifaceted *Timberlane* approach. But the trouble is that, basing oneself on some of the other "factors to be weighed," the contrary position could be adopted as well; for instance, by asserting that the United States should have decided the dispute between two U.S. nationals in *Timberlane,* or that it should have yielded to German bank secrecy in *Citibank,* insisted on dissolving the petroleum cartel or acquiesced in the U.S. effects resulting from the restructuring of the Swiss chemical industry in *CIBA-Geigy.* Which of the two contrary positions is correct, in the last analysis, depends on the interpretation of reasonableness used when weighing those factors.

Once more, the differences between conflict of laws and international law must be remembered. The use of reasonableness to guide the selection and weighing of an all-encompassing list of considerations may be regarded as a highly advanced method of resolving legal disputes in the domestic law context. In international law, reference would have to be made to reasonableness as understood by the peoples of the 160 sovereign states, or at least to reasonableness as perceived by the states opposing each other in the particular conflict. It would therefore not be surprising if the cases decided in favor of domestic jurisdiction by the courts of one state were decided differently by the courts of the other state involved. And if an international tribunal had occasion to decide any of the cases by applying the rule of reasonableness as laid down in section 403 of the draft *Restatement,* there is no way to predict its decision.

Under international law, not every conceivable aspect of a case can be relevant. The International Court of Justice made that point when Tunisia invoked its generally unfavorable economic situation to support its claim against Libya for a larger share of the continental shelf.[86] Adoption of Tunisia's argument could indeed have compensated for the unequal distribution of natural resources between the two neighboring countries. Yet such a consideration, however "reasonable" it might be, was correctly held not to be legally relevant to the delimitation of the continental shelf. Similarly, as is submitted, *Timberlane* is too open a rule to be operable on the level of international law. Whether it is a rule of U.S. conflict of laws is outside the ambit of this paper. And *Laker,* as was said earlier, does not reflect state practice. What, then, is the law?

3. The Middle Course: Respecting Predominant Interests of Foreign States

Except for a few very basic, and nevertheless disputed, customary international law rules on human rights, individual interests are mediated by states.

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[86] Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18, 77 (Judgment of Feb. 24).

Normally, they are only protected insofar as they are represented by foreign states under the international law rules regarding the protection of aliens. Under those circumstances, the interests most likely to be protected by international law are state interests. It is therefore difficult to see how regulatory interests would lose their relevance if a great number of other states preferred a different type of regulation, as is nevertheless suggested in section 403(2)(c) and (f) of the draft *Restatement*. Furthermore, in contrast to the assumption made in section 40(b) of the *Restatement (Second)* and, more vaguely, in section 403(2)(d) of the draft *Restatement*, there is little room for individual hardship arguments in antitrust cases at a time when the very basis for human rights in customary international law is still insecure; and why should foreign nationals in conflicts of antitrust jurisdiction have the privilege of enjoying international law protection unrelated to the interests of their home state?

The theoretical argument is confirmed by state practice. The negotiations that since 1947 have usually taken place have brought about compromises by a give-and-take of state interests. Although section 40 of the *Restatement (Second)* lists comparison of state interests only as the first of several nonexhaustive factors, precisely that comparison appears to have played a dominant role in judicial practice. For instance, Judge Kaufman, writing the opinion for the Court of Appeals for the Second Circuit in *United States v. First National City Bank*, focused on that aspect of the case.[87] A similar line of reasoning may be found most notably in the *Uranium* decision of the Court of Appeals for the Tenth Circuit.[88] In the *Synthetic Rubber* case, the Kammergericht explicitly proceeded under a rule demanding a balancing of state interests only.[89] The same position was adopted by a quasi-judicial "Deciding Division" of the Federal Cartel Office in the *Cigarettes* case. On appeal, the Kammergericht saw no need to come back to the balancing rule, because an assumed international law principle of necessity was considered to be controlling.[90] In addition to those cases, mention may be made of instances in which the application of domestic antitrust law was declined under the act of state doctrine or under the foreign government compulsion defense.[91] From the point of view of international law, those domestic law devices of conflict avoidance may be interpreted as according a per se preference to foreign interests without engaging in any balancing. Therefore, state practice suggests that there is an international law obligation to pay respect to foreign state interests.

To pay respect may mean polite reverence without any practical consequence, it may mean to yield in substance whenever foreign interests are affected, or it may mean to take account of foreign interests to any other degree between those two extreme positions. Is it possible to place the assumed international law obligation more precisely on that scale of different shades of meaning? Some guidance may be derived from the principle of sovereign equality. Under that principle, each state must have an equal opportunity to exercise its sovereignty, i.e., in the present context, to pursue the regulatory goals it has decided to adopt. If the pursuance of those goals conflicts with those of other states, reconciliation must be sought on a basis of equality. Normally, reducing the foreign-related impact of regulatory action is sufficient to maintain sovereign equality. If such accommodation is not possible, equality may eventually suggest to one state that it refrain from regulation altogether if the other state's interests may be deemed to be prevailing.

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[87] United States v. First Nat'l City Bank, 396 F.2d 897, 902 (2d Cir. 1968).

[88] *In re* Westinghouse Elec. Corp. Uranium Contracts Litigation, *In re* Subpoenas Duces Tecum, 563 F.2d 992, 998 (10th Cir. 1977).

[89] KG, Decision II of Nov. 26, 1980, WuW/E OLG 2419, 2420 (Bayer/Firestone).

[90] FCO, Decision of Feb. 24, 1982, WuW/E BKartA 1943, 1953 (Morris/Rothmans); KG, Decision of July 1, 1983, WuW/E OLG 3051, 3057 (Morris/Rothmans).

[91] *See* cases cited in notes 71 and 72 *supra*.

International antitrust practice has never abandoned the quest for equality. No state has ever claimed to be entitled to take measures of antitrust law even if foreign interests in not having those measures taken prevailed. The notion of equality in the process of balancing state interests has now found expression in the recent Memorandum of Understanding between Canada and the United States on antitrust matters.[92] In section 7(3) of the agreement, it is implied that whenever one side considers the interests of the other side to be "predominant," it will yield jurisdiction. Reserving the evaluation of interests to each side is in line with the State Department's recent policy of claiming an exclusive role for diplomatic negotiations.[93] Thus, the obligation to pay respect to prevailing interests of foreign states could be formulated as follows:[94] a state is prohibited from taking measures of antitrust law if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states likely to be seriously injured by those measures.

The objective of the rule is to prohibit interference with the sovereignty of foreign states, i.e., exercising influence short of intervention. It may, therefore, be called the rule of noninterference in the field of antitrust law. As such, it forms part of the general principle of noninterference without, however, sharing the usually vague meaning of that principle, which makes it akin to political rhetoric. It may in fact be wondered why, in antitrust law, noninterference has developed into a relatively precise rule of law. Measures of antitrust law are designed to establish and protect a certain concept of domestic policy. The transnational aspect comes in, almost inadvertently, mainly because of the general situation of economic interdependence, whereas, for instance, embargo measures aim at influencing the policy of foreign states. Besides, antitrust law has developed a more consistent pattern of state practice since judicial decision making—with the goddess Justitia using the balance—has played such an important role. Thus, the rule of noninterference is one of antitrust law. An identical or a similar rule relating to other branches of law would have to be established separately.

[92] Memorandum of Understanding between the Government of the United States of America and the Government of Canada as to Notification, Consultation and Cooperation with respect to the Application of National Antitrust Laws, Mar. 9, 1984, *reprinted in* 23 ILM 275 (1984).

[93] *See* notes 28–32 *supra* and accompanying text.

[94] For a similar formulation and extensive reasoning, see K. MEESSEN, *supra* note 78, at 198–232.

The rule of noninterference requiring a balancing of state interests was described by the author in a publication of 1975,[95] which was preceded by observations of others pointing in a similar direction.[96] In the meantime, the rule has received some recognition by writers, mainly in Germany.[97] Others have suggested that the rule be adopted as one of conflict of laws.[98] But judicial and administrative practice, in the *Synthetic Rubber* and *Cigarettes* cases, has stressed the international law character of the rule.[99] Outside Germany, similar views have been developed quite independently of the author, the emphasis there usually being on conflict of laws.[100]

The balancing rule is not the ideal answer to the challenge of concurrent jurisdiction in antitrust law. But for the time being, it seems to be the only rule capable of maintaining sovereign equality under the conditions of diverse and fluctuating regulatory interests. If, as regards its contents, it recommends itself as the middle course between *Laker* and *Timberlane*, its completely different underpinnings of international law should not be overlooked.

4. *Operating the Balancing Rule of Noninterference*

The criticism directed against the *Timberlane* approach might also apply to the balancing rule advocated here. However, the field is no longer open to any possibly "reasonable" consideration. Moreover, the relationship between the two remaining factors—domestic and foreign interests—has clearly been established as one of equality. But there is that ominous influx of political considerations into a legal rule. It may therefore be appropriate to discuss the operation of the rule in the light of state practice.

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[95] *Id.*; *see also* Meessen, *Zusammenschlusskontrolle in auslandsbezogenen Sachverhalten*, 143 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 273 (1979).

[96] A.-C. Kiss, L'Abus de droit en droit international 195 (1953); Jennings, *Extraterritorial Jurisdiction and the United States Antitrust Laws*, 33 Brit. Y.B. Int'l L. 146, 153 (1957); Seidl-Hohenveldern, *Kartellbekämpfung im Gemeinsamen Markt und das Völkerrecht*, 1960 Aussenwirtschaftsdienst 225, 228; Jaenicke, *Comment*, in International Law Association, Report of the 52nd Conference 33 (1966); Jennings, *General Course on Principles of International Law*, 121 Recueil des Cours 323, 525 (1967 II).

[97] Deringer, *Extraterritorial Application of Antitrust Laws*, 1980 Int'l Cont. L. & Fin. Rev. 323, 328; Hölzler, *Die Wettbewerbsproblematik multinationaler Unternehmen*, in Handbuch des Wettbewerbs 457, 463 (H. Cox, U. Jens & K. Markert eds. 1981); Niederleithinger, *Zur Problematik einer Präventivkontrolle bei Auslandszusammenschlüssen*, 1981 Wirtschaft und Wettbewerb [WuW] 469, 471; Harms, *Einleitung Zusammenschlusskontrolle*, in Gemeinschaftskommentar, GWB, No. 118 (4th ed. 1981); Turner, *Die Lösung von Zuständigkeitskonflikten bei der Anwendung nationaler Wettbewerbsvorschriften*, 1982 WuW 5; B. Wagner, Die Konzentrationskontrolle in der EWG und ihre Bedeutung für Zusammenschlüsse schweizerischer Unternehmen 122 (1982); Schaub & Kersten, *Präventivkontrolle gemäss §24 a GWB für ausländische Unternehmenszusammenschlüsse*, in Festschrift für A. Sölter 261 *et seq.* (1982); Meng, *Vorbem zu Art. 85 bis 89*, in Kommentar zum EWG-Vertrag, No. 34 (H. v. d. Groeben, H. v. Boeckh, J. Thiesing & C. D. Ehlermann 3d ed. 1983). With some reservations: Markert, *Fusionskontrolle*, *supra* note 68, at 119 *et seq.*; K. Authenrieth, Die grenzüberschreitende Fusionskontrolle in Theorie und Praxis 56 (1982). Rejecting the author's view: Mann, *supra* note 77, at 542; Huber, *Auswirkungstheorie und extraterritoriale Rechtsanwendung im internationalen Kartellrecht*, 1981 Zeitschrift für Unternehmens- und Gesellschaftsrecht 510, 545 *et seq.*

[98] Rehbinder, *§98(2)*, in U. Immenga & E. Mestmäcker, GWB, No. 266; W. Möschel, Recht der Wettbewerbsbeschränkungen 85 (1983).

[99] *See* notes 89 and 90 *supra*.

[100] To compare approaches, see Gerber, *supra* note 50. For a similar international law approach, cf. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 Brit. Y.B. Int'l L. 1 (1982).

The direct reference to political interests signalizes the early stage of development of the international law on antitrust jurisdiction. Reference to policy considerations, however, is not unfamiliar to conflict lawyers when they resort to the public policy exception, which operates as a safety valve if a reference to foreign law is too generous. Of course, the above balancing rule refers not only to domestic but also to foreign interests. But, from the point of view of international law, a reference to the "public policy" of more than one state is not that unusual. In its decision in the German-Icelandic *Fisheries Jurisdiction* case, the International Court of Justice stated:

> Due recognition must be given to the rights of both Parties, namely the rights of the Federal Republic to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.[101]

Since domestic and foreign interests are legitimate elements of the balancing rule, the evidence for their presence in a particular case has to be produced pursuant to the applicable procedural law, as with any other evidence. Specific statements of the domestic government and the foreign government are helpful, but they are not dispositive from the point of view of international law. They would have to be related to policy trends as laid down, for instance, in statutory enactments or in general pronouncements of policy. Some types of economic and competition policy are enforced by regulatory legislation, and some by nonregulation, i.e., by deliberately leaving room for private arrangements. Both types of policy may have equal importance.[102] In the *Swiss Watch* case, the United States finally decided to respect the watch cartel, though it was merely sponsored by the Swiss Government without being protected by specific legislation. That point is confirmed by section 6 of the U.S.-Canadian understanding of March 9, 1984, where it is now recognized that "such interests would normally be reflected in antecedent laws, decisions or statements of policy by the competent authorities."[103]If a blocking statute has been enacted, this is not dispositive either. The statute itself would have to be checked to see whether it is questionable under the balancing rule. And it would be significant if a state has a blocking statute but does not employ it in the respective case, as was the attitude of Great Britain in the *Cigarettes* case.

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[101] Fisheries Jurisdiction (FRG v. Ice.), 1974 ICJ REP. 175, 200 (Judgment of July 25).

[102] For a more extensive discussion, cf. K. MEESSEN, *supra* note 78, at 219 *et seq.*

[103] *Cf.* note 92 *supra.*

Ascertaining the policy interests of various states requires that they be localized. In doing so, recourse may be had most pragmatically to some of the traditional techniques regarding delimitation of jurisdiction.[104] If, as it was argued in the *IBM* case, antitrust measures are likely to curtail the research incentives of a foreign enterprise, the interests of the foreign home state of that enterprise may be affected as well, because its technological progress may to some extent depend on the research undertaken by that enterprise. Similarly, the place of conduct helps to localize interests if, for instance, freight rates are applicable to the traffic of certain ports. Or a group of connecting factors may establish a "center of gravity." When plants located in a foreign country and not likely to produce for the domestic market are purchased by another company located in that foreign state, as in *Bayer/Firestone*, foreign interests are likely to be affected to a greater extent than domestic interests.

Balancing of interests is not always as simple as in *Bayer/Firestone*, but experience proves that, in practice, it is less difficult than inherent theoretical problems would suggest. Quite often a close analysis of state interests may offer options for solving the jurisdictional conflict in accordance with the interests of all the states involved, though not at a rate of 100 percent, but perhaps 90 percent. In the *Cigarettes* case, for instance, the United Kingdom was aware of the fact that prohibiting only the German end of the transaction might continue to annoy the British firm Rothmans International, even though it would no longer seriously prejudice British state interests. For the Federal Cartel Office, the 100 percent solution was to use prohibition of the foreign transaction as a lever to enforce its concept of protecting the structure of the German cigarettes market. Limiting the prohibition order to the German end may make enforcement more difficult, but divestiture is still possible. Thus, Germany would also get "90 percent" of what it wanted.

The *Cigarettes* case had given rise to South African opposition, which continued even after the Federal Cartel Office limited the scope of the prohibition order. But here the *Bayer/Firestone* situation was present again, though reversed: a combination of the two German subsidiaries would clearly and strongly affect German interests of competition policy, whereas South Africa was only able to rely on the commercial interest of its national, Rembrandt Group Limited, in having the two German subsidiaries included in the merger transaction. Under the restricted prohibition order, German interests were as clearly prevailing as French interests were in the *Synthetic Rubber* case. And in *Laker*? Nobody would envy Judge Wilkey the task of applying even the narrower balancing rule of noninterference in that case. But it may be observed that confirming a preventive U.S. antisuit injunction directed against eventual British or other foreign antisuit injunctions would not necessarily prejudice later considerations whether to uphold U.S. jurisdiction as regards the basis of the antitrust claim and as regards every possible remedy available under U.S. law.

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[104] For an interesting conflict-of-laws parallel, see Juenger, *A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 33–36 (1984).

Although ascertaining and balancing domestic and foreign interests appears to have worked in practice, the theoretical problem remains unsolved. If the interests of both states are involved to an equal degree and if no 90 percent solution may be worked out, how does one find out which interests prevail? There is indeed no universal standard and usually no standard common to the states party to the particular dispute that would allow interests to be measured and compared in a satisfactory manner. In such a situation, the procedural way out has to be taken:[105] both states must engage in a genuine and serious effort to negotiate a settlement. The courts' role would be limited to examining whether such negotiations have taken place. Only if they have taken place and have proven unsuccessful can domestic jurisdiction be upheld. Under those circumstances, international law would provide no answer to the problem of concurrent antitrust jurisdiction. Remaining silent then, however, is no argument against the existence of a rule that has stood the test of operability in all the cases that have come up so far.

V. IMPROVING THE BALANCING PROCESS

The operability of the balancing rule, if reduced to a comparison of domestic and foreign state interests, cannot be denied. It can be improved, though. Ascertaining state interests could be facilitated by the development of appropriate procedures, and the establishment of a specialized international tribunal charged with handling the balancing process should again be considered.

Intergovernmental consultations at an early stage of investigations have gradually been formalized, at first by bilateral agreements between the United States and Canada, and then by a recommendation of the OECD Council that emerged from the Council's role in settling the *Shipping* case of the early sixties.[106] The OECD recommendation in its latest form of 1979 also requires that in case of conflicting interests, each party should give "full and sympathetic consideration" to the interests of the other parties, while retaining "full freedom of ultimate decision." A similar provision is contained in an agreement between Germany and the United States of 1976, which also includes the obligation to exchange information in antitrust cases. The impact of the *Uranium* case led Australia and the United States in 1982 to provide a framework for government involvement in privately litigated cases. As between those two states, the courts are therefore likely to receive early information on the official views of their own government and of the foreign government. A similar obligation was included in the U.S.-Canadian understanding of March 9, 1984, which supersedes earlier bilateral agreements between the two states.[107] The new agreement provides for an even more comprehensive institutionalization of the balancing process. Its focus on state interests is close to the approach developed in this paper. But the understanding, which is explicitly described as not constituting an "international agreement," does not purport to state the pertinent rules of substantive international law.

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[105] *Cf.* K. MEESSEN, *supra* note 78, at 229, 264.

[106] For a recent account of the history of such instruments and for a reproduction of the text of those currently in force, see OECD, *supra* note 59.

[107] *Cf.* note 92 *supra*.

As regards possible improvements, the OECD Council should consider revising its recommendation along the lines of the U.S.-Canadian understanding. In addition, attempts should be made to supplement the revised text by formulating some of the substantive rules of customary international law. At least a general reference to such rules should be included to make it clear that consultations and negotiations are not to take place in a legal vacuum. Furthermore, domestic procedural law should be examined in the light of the peculiar situation faced by domestic courts in applying the balancing rule. They are forced to seek governmental assistance in order to explore domestic and foreign interests without, at least under German law, being obliged to base their decision exclusively on the information furnished to them. If closer scrutiny of domestic procedural law reveals considerable difficulties in that respect, as can be expected, some adjustment of domestic law to the requirements of international law should be envisaged.

Ideally, of course, the balancing rule of noninterference, like any other rule of international law, should be applied by an international tribunal. Because of the expertise required in the field of antitrust law, reference to the International Court of Justice might arouse mixed feelings. From time to time, it has therefore been proposed that a specialized international antitrust tribunal be established.[108] That proposal is endorsed here.

More than 80 states were prepared to ratify the Convention on the establishment of an International Centre for Settlement of Investment Disputes (ICSID),[109] whereas the much more homogeneous group of some 20 states that has been involved in antitrust disputes has not yet taken any steps to provide for international adjudication. Establishing ICSAD, an International Center for the Settlement of Antitrust Disputes, could perhaps help in the future to avoid the political irritations that unnecessarily accompany legal controversies regarding the exercise of antitrust jurisdiction.

Such a center could set up an arbitral tribunal each time its services are requested. Jurisdiction might perhaps be organized in parallel to the Article 177 procedure under the EEC Treaty: domestic courts confronted with issues of international law in antitrust cases could temporarily suspend proceedings and submit specific questions on the existence and interpretation of rules of international law to ICSAD, which would refer those questions to an appropriate arbitral tribunal. During the proceedings before the arbitral tribunal, each party to the domestic case and each government of a contracting state would have the right to make its views known. After the decision is rendered, domestic proceedings could continue in the light of the tribunal's interpretation of international law. Additionally, governments could be authorized to request advisory opinions similar to those under the Statute of the International Court of Justice. Such requests might result either from concrete cases not yet pending before a domestic court or from general problems such as checking pieces of proposed legislation.

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[108] Resolution, INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 54TH CONFERENCE, at xiii (1970); H. ZWARENSTEYN, SOME ASPECTS OF THE EXTRATERRITORIAL REACH OF THE AMERICAN ANTITRUST LAWS 89 (1970); Cutler, *Extraterritorial Application of Competition Laws*, in EXTRATERRITORIAL APPLICATION, *supra* note 33.

[109] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 UST 1270, TIAS No. 6090, 575 UNTS 159.

The jurisprudence to be developed by such a tribunal would have a general impact on the customary international law of antitrust jurisdiction. There might even be a spillover effect to other branches of the law where jurisdictional conflicts have produced similar patterns of state practice. In any case, wide discrepancies of views, such as those between *Laker* and *Timberlane*, could then soon become a matter of legal history.

THE USE OF INTEREST ANALYSIS IN THE EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW

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In 1945, *United States v. Aluminum Corporation of America*[1] *(Alc[illegible])* established that the Sherman Act applied to foreign conspiracies [illegible]olely because they affected U.S. commerce. Since that time, the governments and commentators of the United States' principal trading partners have opposed this broad extraterritorial application of U.S. antitrust laws.[2] The "*Alcoa* effects test" permits the application of U.S. law to alleged activities occurring entirely outside the United States involving no U.S. actors.[3] It is generally believed within the United States that such a test is necessary to avoid the subversion of the U.S. antitrust laws by domestic corporations acting through foreigners and subsidiaries.[4] This broad application of the U.S. antitrust laws threatens the domestic sovereignty and economic policies of foreign nations. It conflicts with the regulation by other nations of their domestic economies,[5] denies access to American markets for foreign firms complying with their own domestic law, and creates an aura of American legal imperialism over the world economy. Thus, despite the need for an extraterritorial antitrust law, there is a more pressing need for a principled restraint of the *Alcoa* effects test.

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[1] 148 F.2d 416 (2d Cir. 1945).

Several doctrines temper the application of the *Alcoa* test. When a foreign government is a defendant in an antitrust claim, a U.S. court may lack jurisdiction under the Foreign Sovereign Immunities Act.[6] Further, the act of state doctrine, barring U.S. courts from hearing a claim against a private citizen acting on behalf of his own government, may preclude the court from hearing a claim otherwise satisfying the *Alcoa* test.[7] And finally, the courts have enunciated a wide-ranging list of factors which restrain the test's application.[8] The factors highlight foreign state interests and the executive pre-eminence in foreign policy. Even this jurisdictional rule of reason,[9] however, does not satisfy the *Alcoa* test's foreign opponents.

This Note assesses the present restraints on the *Alcoa* effects test and concludes that they do not adequately address the foreign interests prompting its criticism. The restraints require judicial determinations in an area primarily reserved for the executive and the legislature. This Note proposes that the United States federal courts temper the *Alcoa* effects test using the comparative impairment interest analysis suggested by Assistant Attorney General William F. Baxter. Under this test, the court's examination of the factors to be used in determining whether to extend jurisdiction will be limited to those relevant to a comparison of the effects which the application of U.S. law will have on the internal objectives of the foreign nation and the effects which the application of foreign law will have on the internal objectives of the United States.[10] This approach will restrain the extraterritorial application of the U.S. antitrust laws, taking account of the foreign economic interests prompting the opposition to such application, and will prevent the federal judiciary from addressing issues beyond its competence.

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[2] *See infra* notes 88-97 and accompanying text. Lord Lloyd of Kilgerran, Esher Sury, England, stated that "[t]he United Kingdom is not alone in objecting. Some 20 countries have enacted blocking statutes primarily as a reaction to the unacceptable extension of [U.S.] jurisdiction." U.S. Import Weekly (BNA) 214 (Nov. 25, 1981). *See generally* Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 372 (1977).

[3] *See infra* notes 18-33 and accompanying text.

[4] *See* Petit & Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 Bus. Law 697, 697-99, 714-15 (1982).

[5] *See infra* note 90 and accompanying text.

[6] *See infra* notes 66-72 and accompanying text.

[7] *See infra* notes 73-82 and accompanying text.

[8] *See infra* notes 51, 60 & 65 and accompanying text.

[9] Though the jurisdictional rule of reason is occasionally referred to as the "comity doctrine," the factors cited as composing it involve much more than notions of comity. The factors seek to measure fairness and the nexus of the alleged activity to the United States; therefore, the term "jurisdictional rule of reason" more accurately describes the test.

I

HISTORY OF EXTRATERRITORIAL APPLICATION OF UNITED STATES ANTITRUST LAW

A. The Alcoa Effects Doctrine and the Timberlane Jurisdictional Rule of Reason

The Sherman Act expressly applies to commerce with foreign nations.[11] The Act's legislative history presents strong evidence that Congress intended its coverage to reach beyond United States borders.[12] Early cases, however, limited this application. In 1909, the Supreme Court first ruled on the extraterritorial effect of the Sherman Act. In *American Banana Co. v. United Fruit Co.*,[13] the American Banana Company, a U.S. corporation, alleged that another U.S. corporation doing business in Costa Rica had engaged in predatory practices that violated the Sherman Act. Justice Holmes upheld a lower court dismissal on the ground that the Act did not extend to activities performed outside of the United States that were legal within the jurisdiction in which they occurred.[14] Read broadly, *American Banana* exhibits a strict view that a nation has exclusive jurisdiction over activity within its territory. The extraterritorial exercise of jurisdiction diminishes the sovereignty of the foreign nation, and gains validity only by that nation's consent.[15] Subsequent cases narrowed *American Banana,* allowing the extraterritorial reach of U.S. antitrust law when the complainant alleged that some activity occurred in the United States affecting U.S. commerce.[16] The territorial nexus necessary to invoke U.S. antitrust law eventually became more attenuated,[17] culminating in its abandonment in

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[10] *See infra* notes 118-43 and accompanying text.

[11] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations, is hereby declared to be illegal." Sherman Act § 1, 15 U.S.C. § 1 (1976).

Other trade regulation statutes similarly encompass foreign trade. The Federal Trade Commission Act defines commerce to include "commerce . . . with foreign nations." 15 U.S.C. § 44 (1976). The Wilson Tariff Act concerns persons "engaged in importing any article from any foreign country into the United States" when such importation restrains competition. 15 U.S.C. § 8 (1976). The Webb-Pomerene Act exempts from the Sherman Act certain associations of persons engaged in export trade. 15 U.S.C. § 62 (1976). Numerous other antitrust statutes explicitly affect foreign trade. *See generally* W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973).

[12] For a complete discussion of the legislative history indicating Congress' intention for the Sherman Act to have some extraterritorial application, see K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 18-21 (1958). Senator Hoar, author of the version of the Sherman Act that was enacted, stated: "The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States." *Id.* at 21.

Brewster summarizes the legislative history as follows:

> [I]t seems that there were at least two separate and distinct objects of legislative concern with foreign arrangements: an application of the relationship between imports and domestic competition, and a desire on the part of some at least to prevent the act's evasion by jurisdiction-hopping on the part of American concerns . . . . Competition within, or effects upon, foreign markets did not seem to be a matter of congressional concern.

Id. *See also* W. WALKER, HISTORY OF THE SHERMAN LAW (1910).

[13] 213 U.S. 347 (1909).

[14] *Id.* at 356-57, 359.

[15] For a discussion of the territorial principle, as described by Chief Justice Marshall, see Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135-36 (1812).

[16] In Thomsen v. Cayser, 243 U.S. 66 (1917), defendants alleged a combination in restraint of the shipping trade between New York and South Africa. The Court found that "the combination affected foreign commerce of [the United States] and was put into operation here." *Id.* at 88. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Court found a "conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein." *Id.* at 276. The Court felt justified in examining foreign conduct on the basis of both the unlawful acts performed in the United States and the intended and actual effect on U.S. imports and the U.S. sisal market. "[B]y their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." *Id.* *See generally* Kintner & Hallgarten, *Application of United States Antitrust Laws to Foreign Trade and Commerce—Variations on American Banana Since 1909,* 15 B.C. INDUS. & COM. L. REV. 343 (1973).

[17] In United States v. 383,340 Ounces of Quinine Derivatives, Admiralty No. 98-242 (S.D.N.Y. 1928) and United States v. 5,898 Cases Sardines, Admiralty No. 105-37 (S.D.N.Y. 1930), imported commodities were sold in the United States pursuant to a foreign agreement in restraint of trade. This created a sufficient basis for the application of U.S. law because U.S. commerce in the commodities was substantially affected.

In Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944), an action brought under the Federal Trade Commission Act, the defendant circulated advertisements in Latin America which made false representations concerning correspondence courses offered through a U.S. mail-order school. According to the court, "Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States." *Id.* at 35. The

Alcoa.[18]

Alcoa was the first case to bring wholly foreign conduct within the ambit of the U.S. antitrust law based solely on effects within the United States or upon U.S. commerce with foreign nations. Six foreign aluminum producing corporations, including a wholly-owned Canadian subsidiary of Alcoa, formed a Swiss corporation, Alliance.[19] The court found that Alcoa, a U.S. corporation, was not a party to Alliance despite the participation of Aluminum Limited, its Canadian subsidiary.[20] The Alliance shareholders incorporated the U.S. market into a pre-existing quota arrangement.[21] The Alliance cartel[22] allocated a "free" quota to each shareholder, and charged a royalty for sales above that quota, graduated progressively according to the excess.[23] Alliance distributed the royalties as dividends to its shareholders.[24] The cartel allowed producers to charge any price, but evidence from past practices and implications in the agreement indicated that the arrangement effectively set a minimum price.[25] Judge Learned Hand, speaking for the court, held the Alliance agreement unlawful under Section One of the Sherman Act.[26]

To determine the applicability of the Sherman Act to an agreement among persons not in allegiance to the United States, Hand

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primary unlawful activities occurred outside of the United States, however, they were planned in the United States and were performed by U.S. citizens.

The power of U.S. courts over U.S. citizens was also the basis for the extraterritorial application of U.S. law in Bulova Watch Co. v. Steele, 194 F.2d 567 (5th Cir.), *aff'd*, 344 U.S. 280 (1952). There, the Bulova Watch Company alleged trademark infringement and unfair competition in Mexico. Watches bearing the trademark "Bulova" were sold by Steele in Mexico and some found their way into U.S. commerce. Several watch parts were also purchased by Steele in the United States. The Fifth Circuit exercised jurisdiction and applied United States law to acts in Mexico because no conflict with Mexican sovereignty was apparent. The Supreme Court, affirming, distinguished *American Banana*, stating that "the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States." 344 U.S. at 288.

18. *See supra* note 1 and accompanying text. Because a quorum of the Supreme Court could not be obtained, the appeal was transferred to the Second Circuit Court of Appeals as a special statutory court, pursuant to Act of June 9, 1944, Pub. L. No. 332, 58 Stat. 272 (current version at 15 U.S.C. § 29 (1976)). United States v. Aluminum Co. of America, 322 U.S. 716 (1943).

19. 148 F.2d at 442.

20. *Id.*

21. *Id.*

22. In a passing reference, the court pierced the Swiss corporate veil and found that Alliance was an agreement or cartel, and not an independent corporation. *Id.* This finding brought Alliance within the contract, combination or conspiracy requirement of the Sherman Act, Section One.

23. *Id.* at 443.

24. *Id.*

25. *Id.*

26. *Id.* at 445.

considered congressional intent and the "limitations customarily observed by nations upon the exercise of their powers."[27] He concluded that, at a minimum, the Act prohibits agreements that both intend to affect and actually affect U.S. imports.[28] Because the Alliance quota system included the U.S. market for aluminum, the agreement clearly intended to affect United States imports.[29] The court then imposed the burden of proof on the defendant producers to show the absence of actual effect on United States imports.[30] Aluminum Limited failed to meet this burden, and the court found the Alliance agreement in violation of the Sherman Act.[31]

Alcoa departed from earlier cases in several respects: the actors were not U.S. citizens, the agreement was formed outside the United States, and the court did not require that the plaintiff identify U.S. agents.[32] *Alcoa* merely required that the plaintiff establish the defendants' intent to affect U.S. commerce,[33] and the activity's actual effect on such commerce. This test was subsequently labeled the *Alcoa* effects test. If the plaintiff could show that the defendants expressed the requisite intent in a contract, then the burden shifted to the defendants to show no actual effect on U.S. commerce.

Alcoa's requirement that the conduct or agreement have an effect on United States commerce is vague. Courts and commentators have described the standard in various ways.[34] None of them, however, has reduced the uncertainty in applying the law to borderline cases. Clearly, there is a need for an effects test. A strict territorial application of the U.S. antitrust laws would thwart the goals behind the laws, permitting foreign firms to engage in anticompetitive activity denied to U.S. concerns. On the other hand, the unmitigated application of the effects test places no substantial limits on the reach of U.S. laws. Congress did not purport to regulate the world economy when it enacted the U.S. antitrust law,[35] nor would such regulation be accepted by the international community.[36] Nevertheless, an unmitigated application of the effects test would regulate large sectors of the world economy.

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[27] *Id.* at 443.

[28] *Id.* at 444.

[29] *Id.*

[30] *Id.* at 444-45.

[31] *Id.* at 445.

[32] After citing earlier cases that had required plaintiffs to show a U.S. agent, the court stated:

> It is true that in those cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means to executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell [aluminum] ingot.

Id. at 444.

[33] At least one subsequent case weakened the intent requirement by finding constructive intent sufficient to satisfy the first half of the *Alcoa* test. In United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), the court determined that the foreign company's activities were subject to U.S. law based on the *Alcoa* test because: (1) the Dutch firm knew or should have known its conduct furthered the General Electric Company's scheme to restrain foreign competition, and (2) there had been a significant effect on U.S. commerce. Though there was evidence that the foreign company was aware of U.S. antitrust laws, the court stated that specific intent to violate the law was not necessary to satisfy the "intent to affect U.S. commerce" component of the *Alcoa* doctrine. *Id.* at 891. Thus, the court found that a general intent, which might be inferred from acts or terms of an agreement, coupled with an actual effect on U.S. commerce, was sufficient for extraterritorial application of the Sherman Act.

[34] *See, e.g.*, citations in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). "In essence, . . . [t]here is no agreed black-letter rule articulating the Sherman Act's 'commerce' in the international context." *Id.* at 611, *quoting* Rahl, *For-*

The first case to directly confront the deficiency of the effects test was *Timberlane Lumber Co. v. Bank of America*[37] *(Timberlane)*. In *Timberlane,* the Ninth Circuit recast the effects doctrine to articulate the factors that the court found lurking behind decisions applying it.[38]

The Timberlane Lumber Company, an Oregon partnership that milled and exported lumber from Honduras,[39] alleged that the Bank of America and others conspired to interrupt Timberlane operations in order to retain control of the Honduran lumber business for individuals financed and controlled by the Bank.[40] The defendants effectuated their plan by enforcing claims against Timberlane's predecessor in the Honduran courts.[41] The Honduran court issued embargoes against Timberlane's subsidiaries and appointed an interventor, who allegedly received Bank payments to "cripple and, for a time, completely shut down Timberlane's milling operation."[42] Timberlane alleged that its inability to export Honduran lumber affected U.S. lumber imports.[43]

The *Timberlane* court found the effects doctrine inadequate for

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eign Commerce Jurisdiction of the American Antitrust Law, 43 ANTITRUST L.J. 521, 523 (1974).

A "direct effect" standard was applied in United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 309 (E.D. Ohio 1949), *modified and aff'd,* 341 U.S. 593 (1951). Rahl advocates extraterritorial application of U.S. antitrust law if a restraint "substantially affects" U.S. commerce. *See* Rahl, *supra,* at 523. The distinction between direct and indirect effects and the standard of substantial effect do not remedy the vagueness of the requirement of an actual effect on U.S. commerce.

[35] *See supra* notes 11-12 and accompanying text.

[36] *See infra* notes 88-97 and accompanying text.

[37] 549 F.2d 597 (9th Cir. 1976).

[38] *Id.* at 612.

[39] *Id.* at 603-04.

[40] *Id.* at 604.

[41] *Id.*

[42] *Id.* at 604-05.

[43] *Id.* at 605.

determining whether to apply U.S. antitrust law to the case.[44] The court stated that the effects test was "incomplete" because it failed "to consider the other nation's interests . . . [and] the full nature of the relationship between the actors and this country."[45] The court, however, noted that United States courts, "even when professing to apply an effects test," have often considered "comity and the prerogatives of other nations" in their decisions to apply U.S. law.[46] To incorporate these concerns more fully into the court's decision, the court established a tripartite analysis.[47] First, the plaintiff must show some effect on U.S. commerce.[48] Second, the plaintiff must show that the alleged restraint produced sufficient effect to be cognizable as a Sherman Act violation.[49] And third, the court should weigh factors of fairness and comity to determine whether to apply U.S. law.[50] This tripartite analysis refined the examination of the effect on U.S. commerce that is sufficient to warrant extraterritorial antitrust law application. The long list of factors relevant to the third part of the test, however, created an extremely broad inquiry. The factors included:

> 1. The degree of conflict with foreign law or policy.
> 2. The nationality or allegiance of the parties and the locations or principal places of business of corporations.
> 3. The extent to which enforcement by either state can be expected to achieve compliance.
> 4. The relative significance of effects on the United States as compared to those elsewhere.
> 5. The extent to which there is explicit purpose to harm or affect American commerce.
> 6. The foreseeability of such effect.
> 7. The relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[51]

The court held that Timberlane satisfied the first and second tests,[52] but that the record below was insufficient to permit a decision on the test of international comity and fairness.[53] The court remanded for a consideration of the factors relevant to the third test, suggesting that the district court would have difficulty making a determination because "it is clear . . . that the most direct economic effect was probably on Honduras. However, there has been no indication of any conflict with the law or policy of the Honduran government."[54]

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[44] *Id.* at 611-12.

[45] *Id.*

[46] *Id.* at 612. The court stated that, "[t]he failure to articulate these other elements . . . is costly, however, for it is more likely they will be overlooked or slighted in interpreting past decisions and reaching new ones." *Id.*

[47] *Id.* at 613.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 614.

[52] *Id.* at 615 (numbering added).

[53] *Id.*

The *Timberlane* analysis is known as the jurisdictional rule of reason.[55] The Ninth Circuit further articulated this approach in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*[56] There, the court reversed the district court, and applied U.S. antitrust law to foreign activities. The district court had required a substantial effect on U.S. commerce to apply the antitrust laws extraterritorially.[57] The Ninth Circuit cited *Timberlane* as eliminating the explicit concern for substantiality. The court stated that a consideration of the factors of comity and fairness incorporates the substantiality standard. Furthermore, the court explained that a court should balance the factors proposed in *Timberlane*. The absence of a single factor was not determinative.[58] Not all of the factors considered must weigh in favor of extraterritorial application of U.S. law. Instead, the factors must, on balance, indicate that application is appropriate.

The Third Circuit adopted the jurisdictional rule of reason in *Mannington Mills, Inc. v. Congoleum Corp. (Mannington Mills)*,[59] restating many of the *Timberlane* factors and adding the following:

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[54] *Id.*

[55] *Id.* at 613. The court borrowed the phrase from K. BREWSTER, *supra* note 12, at 446. The determination of whether to apply United States antitrust law is essentially a determination of whether to exercise jurisdiction. The Ninth Circuit applies the tripartite *Timberlane* analysis to determine if the court *should* exercise jurisdiction. Timberlane Lumber Co. v. Bank of America, 549 F.2d at 613; *accord* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1299-1300 (3rd Cir. 1979) (Adams, J., concurring). Other courts, however, apply a two-fold test: "(1) does subject matter jurisdiction exist; and (2) if so, *should* it be exercised?" Conservation Council of Western Australia v. Aluminum Co. of America, 518 F. Supp. 270, 274 (W.D. Pa. 1981). Thus, "the considerations of international comity [can be] reviewed as part of the threshold jurisdictional decision or in connection with a subsequent determination regarding abstention. . . ." Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680, 688 (S.D.N.Y. 1979). If the factors of fairness and comity are considered in determining whether jurisdiction *should* be exercised, the first two tiers of the *Timberlane* tripartite analysis would be used to decide whether jurisdiction even exists.

[56] 556 F.2d 406 (9th Cir. 1977).

[57] Wells Fargo & Co. v. Wells Fargo Exp. Co., 358 F. Supp. 1065, 1077 (D. Nev. 1973).

[58] 556 F.2d at 428.

[59] 595 F.2d at 1294-98. In *Mannington Mills*, both the plaintiff and defendant were United States manufacturers of floor coverings. The plaintiff alleged that the defendant secured foreign patents by fraud, which, if perpetuated in securing a domestic patent, would violate the antitrust laws. The patents allegedly secured by fraud were issued by twenty-six foreign countries. Although the plaintiff desired to resolve the matter as a unitary one, the court declined to treat it in that fashion. Rather, the court stated that on remand, the lower court would have to assess the involvement of each country against the principles of comity. The result in each case would not need to be identical with respect to the different nations or the different types of relief considered on the basis of each nation's patent issue. The plaintiff sought treble damages and an injunction to prevent Congoleum from enforcing the patents in their respective nations. Either or both

> 1. Availability of a remedy abroad and the pendency of litigation there.
> 2. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief.
> 3. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries.
> 4. Whether an order for relief would be acceptable in this country if made by a foreign nation under similar circumstances.
> 5. Whether a treaty with the affected nations has addressed the issue.[60]

In a confusing opinion, the Seventh Circuit failed to apply the jurisdictional rule of reason in a case where the defendants defaulted.[61] It upheld a District Court's extraterritorial application of the antitrust laws despite the lower court's failure to apply the *Timberlane* comity and fairness factors. The court stated, "the *Mannington Mills* factors are not the laws of this Circuit."[62] It rejected the *amici curiae*'s arguments that the *Timberlane* factors weighed against the application of U.S. law.[63] The court also found little value in remanding the case for a consideration of the factors, stating, "the District Court would be placed in the impossible position of having to make specific findings with the defaulters refusing to appear and participate in discovery."[64] Thus, despite the *amici*'s arguments, the court found the factors inapplicable, at least when foreign defendants default. It is unclear from the conflicting language in the opinion whether the Seventh Circuit rejected the jurisdictional rule of reason altogether or merely when defendants default.

Whether a court views the *Alcoa* effects doctrine in its original form, or as refined by the jurisdictional rule of reason, both the articulation of the standard and the relevant factors can vary greatly

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of these types of relief could conceivably stand or fall after an analysis of the factors of comity and fairness.

[60] *Id.* at 1297-98 (factors are renumbered).

[61] *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).

[62] *Id.* at 1255.

[63] *Id.* at 1255-56.

[64] *Id.* at 1256. *But see* Recent Development, *Antitrust Law: Extraterritoriality*, 21 HARV. INT'L L.J. 515, 522 (1980). The authors argue that the *amici curiae* could supply the necessary material since the majority of factors considered would involve matters external to the defaulter's alleged unlawful activities. The only factors in either *Timberlane* or *Mannington Mills* that would perhaps require discovery of information within the control of the defaulters are (1) intent to harm U.S. commerce and (2) the forseeability of the effect on such commerce. If the plaintiffs' allegations on these points are accepted for purposes of the balancing test, the analysis would not be significantly impaired. *Amici curiae*, including affiliates of the defaulters or their governments, could provide all other necessary discovery to the court.

The analysis proposed in this Note, *infra* notes 118-43 and accompanying text, can be performed in the absence of defaulting defendants.

from case to case.[65] In addition, it is unclear whether all of the Circuits accept the rule of reason. Nevertheless, it remains clear that *Alcoa* requires a finding that foreign actors intend to affect and actually do affect U.S. commerce. Once this finding is made, the courts usually assess factors in the case that may cause the court to decline application of U.S. antitrust laws. These factors are general in nature, and create a broad judicial inquiry.

B. Defenses to the Extraterritorial Application of United States Antitrust Laws

Before assessing whether the U.S. antitrust laws are applicable to foreign conduct under the *Alcoa* effects test or the jurisdictional rule of reason, a U.S. court will first consider two independent defenses to the extraterritorial application of U.S. law. Both defenses are invoked in cases involving foreign sovereigns. First, if a foreign government is an actor in the allegedly unlawful conduct, sovereign immunity may bar jurisdiction over the government in U.S. court. Second, if a foreign governmental act is part of the allegedly unlawful conduct, the act of state doctrine may prevent the application of U.S. law to foreign private defendants. This section explores the current scope of these two defenses and then discusses the interface of the defenses with the determination of the extraterritorial application of U.S. antitrust law.

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[65] The *Timberlane* factors, *see supra* text accompanying note 51, and the *Mannington* factors, *see supra* text accompanying note 60, for example, are not identical in coverage or language. Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) provides a third statement of appropriate factors:

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

These factors were each examined by the Ninth Circuit in United States v. Vetco, Inc., 644 F.2d 1324, 1331 (9th Cir. 1981), in lieu of the longer list presented by the same court in *Timberlane*, 549 F.2d 597 (9th Cir. 1976).

Brewster states the jurisdictional rule of reason factors as follows:

(a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad;
(b) the extent to which there is explicit purpose to harm or affect American consumers or American business opportunities;
(c) the relative seriousness of effects on the United States as compared with those abroad;
(d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them;
(e) the degree of conflict with foreign law and policies; and
(f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. Brewster, *supra* note 12, at 446.

1. Sovereign Immunity

In the Foreign Sovereign Immunities Act (FSIA),[66] Congress codified the long-standing doctrine that a foreign sovereign is immune from suit,[67] absent its consent, unless the activities prompting the suit are commercial in nature.[68] A court determines whether the activity is commercial based on the nature of the activity rather than its purpose.[69] A foreign sovereign may regulate economic activity without losing immunity from the antitrust laws;[70] a foreign sovereign operating a business through a corporation, however, is not immune.[71] The legislative history of the FSIA gives the courts wide latitude in characterizing activity as commercial or noncommercial.[72]

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[66] Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-611 (1976)) [hereinafter referred to as FSIA].

[67] Chief Justice John Marshall applied the doctrine in Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). In that case, the Court declined to exercise jurisdiction over a sovereign defendant, holding that a foreign state was absolutely immune from suit unless it consented. Marshall later modified this rule in Bank of the United States v. Planter's Bank, 22 U.S. (9 Wheat.) 904, 907 (1824), where he stated that "when a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Planter's Bank* laid the foundation for the commercial activity exception to sovereign immunity in the FSIA. *See infra* note 69.

[68] Prior to the passage of the FSIA, the Supreme Court expressed concern for United States foreign relations and the concept of separation of powers. *See, e.g., Ex parte* Republic of Peru, 318 U.S. 578 (1943), where the Court referred to "the policy, recognized both by the Department of State and the courts, that our national interest will be better served . . . if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Id.* at 589. Courts deferred to State Department judgments as to whether the defense of sovereign immunity ought to be allowed in a particular case. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). In 1952, the State Department adopted the "restrictive theory" of sovereign immunity, denying the defense to a sovereign in cases involving commercial activity. Letter from Acting Legal Adviser, Jack B. Tate, to Department of Justice (May, 19, 1952) *reprinted in* 26 Dep't State Bull. 984 (1952).

[69] FSIA, *supra* note 66, at 28 U.S.C. § 1605(a) (1976), provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Commercial activity is defined as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose." *Id.* at § 1603(d).

[70] *See* International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) [hereinafter referred to as *IAM*]; Note, *Sovereign Immunity*, 13 VAND. J. TRANSNAT'L L. 835 (1980). The court in *IAM* determined that OPEC's activities were not "commercial" within the FSIA. The pricing mechanism was considered a means of controlling production of a prime natural resource. As such, the regulation was an activity in which only a sovereign may engage

2. Act of State

In the seminal act of state case, *Underhill v. Hernandez*,[73] the Court held that, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[74] This doctrine has always influenced the extraterritorial reach of U.S. antitrust law. The Court recently articulated the reasoning behind the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*,[75] where it stated:

> The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further the country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[76]

Rejecting an inflexible rule, the Court stated that a "balance of relevant considerations" should determine whether United States courts should invoke the doctrine.[77] The import of the subsequent cases interpreting the act of state doctrine is that courts should avoid inter-

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and therefore was non-commercial. *IAM* at 567. The court found support for this characterization in the United Nation's position that as a matter of international law a sovereign has the exclusive right to control its natural resources. *Id.* at 567-68.

U.S. courts have also preserved the foreign sovereigns' antitrust immunity by finding that it is not a "person" within the meaning of the Sherman Act, Section One. Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *IAM*, *supra* note 70, at 570-72; Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). *Cf.* Parker v. Brown, 317 U.S. 341 (1943) (a domestic state is not a "person" under the Sherman Act). *But cf.* Pfizer, Inc. v. India, 434 U.S. 308 (1978) (foreign sovereign may be a plaintiff "person" under the Sherman Act).

[71] In Outboard Marine Corporation v. Pezetel, 471 F. Supp. 384, 395 (D. Del. 1978), the court held that Pezetel, an agency created by the People's Republic of Poland, was not immune from suit under the Sherman Act for allegedly unlawful activities in the manufacture and sale of electric golf carts. Such activity was commercial under the FSIA. Corporations and agencies created or authorized by foreign countries are explicitly covered by the Sherman Act. 15 U.S.C. §§ 7, 12 (1976).

[72] H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 16 *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615: "the courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if it were practicable."

[73] 168 U.S. 250 (1897).

[74] *Id.* at 252.

[75] 376 U.S. 398 (1964). The Court stated that the doctrine was not compelled by international law, *id.* at 421, or by the Constitution, *id.* at 423. It derives from the concept of separation of powers in matters bearing on foreign policy. *Id.* at 427-28.

[76] *Id.* at 428.

[77] The Court stated:

ference with U.S. foreign policy.[78] Invocation of the doctrine is an exercise of judicial restraint.[79] To apply the act of state doctrine, the foreign sovereign's involvement must be significant.[80] In addition,

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> . [S]ome aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Id.

[78] In Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 (1976), the Court restated the act of state doctrine as follows:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarass the Executive Branch of our Government in the conduct of our foreign relations.

Dunhill involved a suit by importers of cigars manufactured by nationalized Cuban firms to recover large sums paid in error to interventors appointed by the Cuban government for pre-nationalization shipments. The refusal of the interventors to repay the money did not, according to a plurality of the Court, rise to the level of an act of state:

> No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated her obligations in general or any class thereof or that she had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Id. at 695. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 (1965):

> [A] court in the United States . . . will refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.
>
> . . . .
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> *Comment d. Nature of act of state.* An "act of state" as the term is used in this Title involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory . . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to public interests.

[79] *See, e.g.,* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977), where the court found that the act of state doctrine precluded inquiry into the motivation behind an anticompetitive act of a sovereign to determine whether the act was instigated by private defendants. Here, the Libyan government had nationalized plaintiff's assets. Plaintiff did not challenge this nationalization; rather, he argued that because of the conduct of the defendants, he was induced to take an intransigent bargaining stance with the Libyan government, causing the government to nationalize his assets. To examine whether the concerted action of defendants caused the nationalization, the court would have had to inquire into the motive of the Libyan government for nationalization. The court stated that "the issue of legality cannot be isolated from the issue of motivation of the foreign sovereign." *Id.* at 78. Because the court declined such an inquiry, the private defendants were saved from liability for their alleged role in the nationalization of plaintiff's assets in Libya.

[80] The Supreme Court refused to allow the act of state defense in two cases where the foreign sovereign was not sufficiently involved. In United States v. Sisal Sales Corp., 274 U.S. 268 (1927), the Court rejected an act of state defense where the defendant claimed that the foreign government merely approved the allegedly unlawful activity. The Court also refused to base the defense on actions by a foreign government which were induced by the defendants. The Court reaffirmed this position in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962). In that case, the Canadian government appointed a private corporation as its exclusive wartime agent for the importation and allocation of vanadium. The Canadian corporation conspired with its U.S. affiliate to exclude a competitor of the affiliate from the Canadian market. The Court

the act of state defense is limited by a commercial activity exception,[81] which parallels that under the FSIA.[82]

3. Interface of the Defenses with the Jurisdictional Rule of Reason

The policies behind the Foreign Sovereign Immunities Act and the act of state doctrine, while not expressly applied to the jurisdictional rule of reason test, nevertheless, demonstrate a problem inherent in it. The statutory defense of sovereign immunity and the judicially created act of state doctrine originated in the separation of powers concept.[83] Through the FSIA, Congress determined the extent to which the judiciary could impact on the policies of foreign states and on U.S. foreign relations.[84] The act of state doctrine, through a practice of judicial abstention, mirrors that policy in situations not directly involving foreign sovereigns.[85] Both defenses demonstrate the limitations of the judiciary in foreign policy matters. The jurisdictional rule of reason requires the judiciary to determine both foreign governmental reaction to U.S. jurisdiction and the effects on U.S. foreign policy.[86] The breadth of the jurisdictional rule of reason analysis threatens to involve the courts in extrajudicial inquiries and determinations. While it is clear that the *Timberlane*

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held that the defendants were "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government," noting that the plaintiff had not alleged any wrongful activity on the part of the Canadian government and that there was no indication of approval of the efforts to monopolize by an official of that government. *Id.* at 706. The Court's approach to the act of state defense suggests that it may apply only to significant foreign acts. *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). *Compare* Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), where the involvement of the foreign sovereign was, arguably, more significant than in *Sisal* and *Continental Ore*.

An important corollary to the act of state doctrine is the foreign compulsion doctrine, which immunizes conduct that is compelled by a sovereign as if it were an act of state. *See, e.g.*, Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970), where it was a complete defense to the refusal by defendants to sell Venezuelan crude oil to plaintiff that the Venezuelan government imposed a boycott forbidding such sales. The court stated, "[w]hen a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign." *Id.* at 1298.

[81] See Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976), where a plurality of the Court refused to apply the doctrine to the repudiation of a commercial debt. See also Dominicus Americana Bohio v. Gulf & Western, Inc., 473 F. Supp. 680, 689-90 (S.D.N.Y. 1979), where the court suggested that discovery may provide sufficient information to determine if the Dunhill commercial activity exception applied to the defendant's act of state claim.

[82] *See supra* notes 68-72 and accompanying text.

[83] *See supra* notes 67 & 75-78 and accompanying text. *See also* Industrial Investment Development Corporation v. Mitsui & Co., 594 F.2d 48, 51 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980) (the act of state doctrine "has emerged as independently based on concerns of separation of powers").

[84] *See* H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 3-8 (1976).

[85] *See supra* notes 75-78 and accompanying text.

[86] *See supra* text accompanying notes 51 & 60.

court did not intend to merge the defenses into the jurisdictional rule of reason analysis,[87] the defenses demonstrate that the rule of reason encroaches too far into the sphere of executive responsibility when it overlaps with the foreign policy interests delimited by the FSIA and act of state defenses.

The interest analysis approach proposed in this Note is concerned with the policies of both the United States and foreign states and, unlike the jurisdictional rule of reason test, expressly avoids judicial determinations of foreign policy. The inquiry under the interest analysis approach must follow consideration of the sovereign immunity and act of state defenses. If one of the defenses applies, then no further inquiry is necessary. If both defenses fail or are inapplicable, then interest analysis is appropriate. At no time, however, should the court re-examine the determination of Congress under the the FSIA or its corollary in the act of state doctrine. Despite the interface between the defenses and the determination of the extraterritorial application of U.S. antitrust law, neither the jurisdictional rule of reason nor the interest analysis approach obviates or embellishes separate consideration of the defenses in accordance with the distinct lines of authority interpreting them.

Although the two defenses focus on limiting the role of the federal judiciary in the foreign policy sphere, they do not address foreign objections to the extraterritorial application of U.S. antitrust law. This Note will consider the nature of these objections before examining the interest analysis approach, which seeks to focus on the fundamental State concerns and foreign objections in an effort to accommodate both.

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[87] The court rejected the act of state defense which the defendant claimed on the basis of judicial proceedings that were instituted by the defendant. The court stated:

> Timberlane does not seek to name Honduras or any Honduran officer as a defendant or co-conspirator, nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United States. In fact, there is no indication that the actions of the Honduran court and authorities reflected a sovereign decision that Timberlane's efforts should be crippled or that trade with the United States should be restrained.

Timberlane, 549 F.2d at 608. Note, however, that though the court considered the act of state defense separately and before discussing the jurisdictional rule of reason, the inquiry into the factors of comity might make use of some of the same facts. The above quoted passage, for example, suggests that Honduras had no policy which enforcement of U.S. antitrust laws would impair, and that judicial involvement posed no threat to U.S. relations with Honduras. Also, the court later indicated that the district court's determination under the jurisdictional rule of reason would be difficult because the most direct economic effect was on Honduras, yet no conflict with Honduran policy was apparent.

C. Foreign Objections to the Extraterritorial Application of United States Antitrust Law

Foreign objections to the extraterritorial reach of the U.S. antitrust law essentially arise from the negative impact that reach has on the objectives of foreign nations. The foreign objectives affected can be discovered by examining each nation's legislation. The objectives are the states' expressions of the interests they seek to protect.[88] In the antitrust context, foreign objections to extraterritorial reach appear to arise from four sources of conflict: (1) different penalties imposed by each government, although policy goals are similar; (2) different views as to the activities that should be proscribed; (3) different national economic goals; and (4) different views of the reach of sovereign jurisdiction.[89] When such conflicts arise, foreign nations may attempt to thwart the pursuit of the conflicting U.S. objective through blocking legislation.[90] This legislation inhibits discovery and prevents the enforcement of United States judgments by domestic courts.

Foreign commentators criticize the *Alcoa* effects doctrine for conflicting with general principles of sovereignty.[91] The jurisdictional rule of reason does not confront this objection. The *Timberlane* court viewed its various comity and fairness factors as an articulation of the elements entering into a determination under the

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[88] *See infra* note 150 for a discussion of the relationship of the objectives underlying foreign law to the four sources of conflict set out in the text accompanying *infra* note 89.

[89] K. Brewster, *supra* note 12, at 39. *See also* Miller, *Extraterritorial Effects of Trade Regulation*, 111 U. Pa. L. Rev. 1092 (1963).

[90] For a discussion of foreign blocking legislation implemented in the United Kingdom, Canada, Australia, South Africa, The Netherlands, Italy, Germany, France and Belgium, see Pettit & Styles, *supra* note 4; Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law*, 1981 Ariz. State L. J. 945, 958-74.

[91] Joseph J. A. Ellis, Member, Bar of the Hague, Netherlands, states:

> It cannot be denied that jurisdiction is an aspect of sovereignty, and that exercise of jurisdiction can never go beyond the limits of sovereignty itself. . . . The mere fact that an act radiates effects upon foreign territory is not sufficient basis for an assumption of jurisdiction by the foreign state unless, in the words of the Permanent Court of International Justice, "one of the constituent elements of the offense, and more especially its effects, have taken place there." In order to vest jurisdiction in the foreign state, therefore, the effects must be a constituent element of the crime.

111 U. Pa. L. Rev. 1092, 1130 (1963), quoting Case of the S. S. "Lotus," P.C.I.J., ser. A, No. 9, at 23 (1927). Ellis also cites other European jurists who criticize the *Alcoa* effects doctrine, *supra* notes 18-33, as a misstatement of the international law. Professor R. Y. Jennings states that, "the *Alcoa* pattern of case goes too far when 'jurisdiction' is assumed over foreigners' foreign agreements, merely because it has been possible to allege some 'effects' on United States imports or exports, and because the agreement would have been illegal if made in the United States." 111 U. Pa. L. Rev., *supra*, at 1131. Professor J. N. W. Verzijl asks, "how could [the *Alcoa*] order ever be directly enforced without a clear infringement of Canada's territorial sovereignty?" *Id.* at 1132.

Alcoa effects doctrine.[92] Even if the various factors represent an attempt to accommodate foreign interests, the uncertainty and breadth of the rule of reason and its judicial application cause the test to be of little comfort to foreign opponents of the effects doctrine.[93]

Foreign diplomats and legislators object to the exercise of jurisdiction and attempted enforcement of procedures and remedies by U.S. courts beyond U.S. boundaries.[94] The tenor of these objections suggests that the major problems are the lack of systematic attention to foreign interests and the seemingly unbridled reach of the current U.S. laws. The Foreign Sovereign Immunities Act[95] and the act of state doctrine[96] are small inroads into the broad extraterritorial effect given U.S. antitrust law. The international character of the contemporary economic environment clearly requires that U.S. antitrust laws have some extraterritorial reach.[97] The systematic consideration of the fundamental foreign objectives implicated in an antitrust case, which consideration is peculiarly within the competence of an independent judiciary, is the approach which could best accommodate foreign objections. The following proposal for the use of interest analysis in the determination of the extraterritorial application of U.S. antitrust law provides such an approach.

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[92] *See supra* note 38 and accompanying text.

[93] Commentators view the jurisdictional rule of reason as only a small improvement over the *Alcoa* doctrine with respect to foreign objections. *See* Comment, *Extraterritorial Application of the Antitrust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U. L. REV. 577, 590-92 (1981). *See also* Pettit & Styles, *supra* note 4, at 714-15 (1982) (noting that the jurisdictional rule of reason has yet to produce a result not co-extensive with the *Alcoa* doctrine). For discussion of the foreign dissatisfaction with the uncertainty of the court-applied rule of reason, see Comment, *supra* note 90, at 962-63.

[94] In response to *General Electric Co., supra* note 33, for example, the Netherlands lodged several protests with the U.S. Department of State and enacted legislation preventing compliance with U.S. court orders with respect to records and operations in the Netherlands. *See* K. BREWSTER, *supra* note 12, at 46-50. See also Note, *Section 6 of Great Britain's Protection of Trading Interests Act: The Claw and the Lever*, 14 CORNELL INT'L L.J. 457 (1982), discussing recent British legislation that undermines U.S. antitrust judgments against British defendants by allowing the British Secretary of State to prohibit compliance with discovery requests of foreign courts and by allowing a British citizen to recover multiple damages paid pursuant to a foreign judgment. The British Secretary of State, in introducing the legislation, stated that:

> My objective in introducing this Bill is to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us . . . . [T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America.
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> . . . .
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> . . . [T]he United States has shown a tendency in certain respects over the past three decades increasingly to try to mould the international economic and trading world in its own image.

Id. at 457, n.2, *citing* 973 PARL. DEB., H.C. (5th ser.) 1533-34 (1979).

See also supra note 2; A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 361-72 (2d ed. 1970); Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195 (1978).

[95] *See supra* notes 66-72 and accompanying text.

[96] *See supra* notes 73-82 and accompanying text.

[97] *See supra* note 4.

II

INTEREST ANALYSIS IN THE INTERNATIONAL CONTEXT

Some commentators have lauded the jurisdictional rule of reason approach to the determination of the extraterritorial application of U.S. antitrust law as an important improvement over the *Alcoa* effects test.[98] Assistant Attorney General William F. Baxter suggests, however, that interest analysis, as applied in domestic conflict of laws cases, may be superior to the jurisdictional rule of reason or comity and fairness doctrine. "Although some tempering of the [*Alcoa*] effects doctrine is clearly appropriate, the judicial application of comity is a less than ideal solution."[99] Baxter contends that "[c]omity is in the eye of the beholder and any long list of factors, such as those in *Timberlane,* 'is simply an open invitation to the court to decide for itself. . . .[I]t is doubtful that courts should take on executive branch responsibility by making that type of judgment.' "[100] The problem with the jurisdictional rule of reason, according to Baxter, is in the permissible breadth of judicial discretion. Baxter proposes an interest analysis approach where "one asks what laws and policies of the arguably interested jurisdictions are implicated by the challenged acts . . . . [T]he courts must attempt to balance the strength of the respective interests . . . ." He believes that "in many cases . . . the apparent conflict is merely illusory."[101]

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[98] *See, e.g.*, U.S. Import Weekly (BNA) 211 (Nov. 25, 1981). Richard J. Favretto noted that "[t]here is a recent judicial trend to recognize comity and conflicts of law principles in seeking to moderate the application of the *Alcoa* 'effects' test in Sherman Act cases of international sensitivity . . . . [The *Timberlane* standards are] widely regarded as having a significant and desirable result." *Id.* Professor Barry E. Hawk of Fordham University Law School "explained that the jurisdictional rule of reason is very important as a radical departure from the *Alcoa* test 'in that it includes directly and expressly the discretionary considerations of international comity in balancing of national interest and policies.' " *Id.* at 213. *But cf.* Note, *Timberlane: Three Steps Forward, One Step Backwards*, 15 INT'L LAW. 419 (1981) where the *Timberlane* balancing test is attacked on three grounds: "the text calls for resolution of issues beyond the competence of the courts; it fails to clarify relevant issues and in fact further confuses them; and it fails to adequately distinguish itself from other defenses and abstention doctrines." *Id.* at 425. The author contends that a return to the *Alcoa* effects test would be an improvement. *Id.* at 431.

[99] U.S. Import Weekly (BNA) 31-32 (Oct. 14, 1981).

[100] *Id.*

[101] *Id.*

Among the factors cited by the *Timberlane* court are "the degree of conflict with foreign law or policy, . . . [and] the relative significance of effects on the United States as compared to those elsewhere."[102] Consideration of these factors alone might approach a simple interest analysis; to the extent that other factors affect the decision, however, the jurisdictional rule of reason departs from the method proposed by Baxter. As Baxter notes, "[t]he problem is not one of etiquette, which the doctrine of comity suggests;" rather, the problem is a conflict of laws and policies.[103] Baxter urges that multilateral negotiation is the paradigm:

> Over the long term, such problems can only be addressed effectively by international negotiation and agreement. In the shorter term, the courts can only attempt to predict the . . . result of such negotiations by estimating the strength of the competing interests and the extent to which these interests would be impaired by a decision one way or another. . . . [The use of an interest analysis approach] would force countries to think about and frame their national interest. . . . [A] dialogue in this area could resolve many of the disagreements about antitrust enforcement.[104]

This section of the Note examines the use of interest analysis in the determination of the extraterritorial application of U.S. antitrust law. The section introduces the interest analysis approach and begins with a discussion of Professor Brainerd Currie's approach to the concept of interest analysis. Although Currie's approach is not as appropriate as Baxter's in the context of antitrust law, no discussion of interest analysis would be complete without mention of his view. Professor Currie's view is followed by a discussion of Baxter's version of interest analysis and why his approach should replace the jurisdictional rule of reason as the device tempering the *Alcoa* effects doctrine.

A. CURRIE'S APPROACH

Interest analysis involves an examination of the governmental policies behind the conflicting rules of decision of arguably interested jurisdictions to determine which interests shall prevail and which policies shall yield in a conflict of laws decision. Proponents of interest analysis generally agree that if only one of the jurisdictions has an interest that would be promoted by application of its rule of decision, while other relevant jurisdictions have no interest which would thereby yield, the conflict is false and the court should apply the rule of the interested jurisdiction. Proponents disagree, however, as to the proper disposition of cases involving true conflicts of interest where more than one jurisdiction has policies that will prevail or yield when the rule of decision is chosen.[105]

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[102] *See supra* text accompanying note 51.

[103] U.S. Import Weekly (BNA) 213 (Nov. 25, 1981).

[104] U.S. Import Weekly (BNA) 32 (Oct. 14, 1981). Baxter is reported as also stating that "the hardest case is where one state encouraged the acts another seeks to challenge." *Id.* Insofar as Baxter is proposing that the act of state defense be merged into an interest analysis approach, his proposal and the thesis of this Note are in conflict.

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105. Early works suggesting an interest analysis approach include Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210 (1946); and Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. Toronto L. J. 133 (1943).

Professor Brainerd Currie has published extensively on the interest analysis approach to conflict of laws issues. For Currie's general thesis, see Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171 [hereinafter cited as *Methods and Objectives*]. Other articles by Currie applying his analysis in the context of specific problems include: Currie, *The Constitution and the "Transitory" Cause of Action*, 73 Harv. L. Rev. 36 (1959); Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9 (1958); Currie, *Married Women's Contracts: A Study in Conflicts-of-Law Method*, 25 U. Chi. L. Rev. 227 (1958) [hereinafter cited as *Married Women's Contracts*]; Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958).

Baxter's approach to interest analysis is set out in Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1 (1963). For other approaches to interest analysis, see Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L.J. 736 (1924); Scoles, *Interstate and International Distinction in Conflicts of Laws in the United States*, 54 Calif. L. Rev. 1599 (1966); Traynor, *Law and Social Change in Democratic Society*, 1956 U. Ill. L.F. 230.

Currie's approach is explained in the text accompanying *infra* notes 106-17; Baxter's approach is explained in the text accompanying *infra* notes 118-43. A third approach applies the rule of decision of the most interested jurisdiction by applying a test similar to Baxter's. *See, e.g.*, Freund, *supra*, at 1216-18; Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L. Q. Rev. 483, 492-93 (1931). A fourth approach chooses the "more effective and more useful law." *See* Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L. 297, 301-02 (1953).

Cavers describes the "most interested jurisdiction" approach as follows:

> The new conception views the basic problem as how to make that choice between conflicting laws which will best accommodate conflicting state policies. This renders it necessary to identify the respective policies and to decide whether they truly conflict, whether the application of one law will defeat or impair the policy objectives of the other . . . .
>
> Where analyses of the policies underlying apparently conflicting laws do not reveal the conflict to be false, nevertheless study of the circumstances of the transaction or event out of which the controversy has arisen may disclose that the reasons for the application of one state's law are significantly stronger than the reasons for applying the law of the other state.

Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, in A.L.I., Study of Jurisdiction Between State and Federal Courts 154, 163-65, app. (Tent. Draft No. 1, 1963).

Baxter denominates the "more effective and more useful law" choice as the "super-value judgment" approach. He describes it as follows:

> Every choice-of-law case involves several parties, each of whom would prevail if the internal law of one rather than another state were applied. Each party is "right," "worthy," and "deserving" and "ought in all fairness" to prevail under one of the competing bodies of law in the view of one of the competing groups of lawmakers. Fact situations which differ only in that they are internal to a single state have been assessed by the different group of lawmakers, and each has reached a different value judgment on the rule best calculated to serve the overall interest of its community. If attention is confined to the circumstances of the immediate parties, the conflict between the internal laws and between the value

Professor Currie has written extensively on the conflict of laws problem in the context of interstate cases. He advocates the application of the law of the forum when both the forum state and the foreign state have a valid governmental interest in the application of their respective laws.[106] Currie finds some support for this approach

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> judgments they are intended to implement cannot be resolved by the judge unless he is prepared to impose still another value judgment upon the controversy. The judge who takes this approach must conclude, for example, that legal systems recognizing past consideration in contract cases embody a juster justice than those that do not.

Baxter, *supra*, at 5.

There is a plethora of additional variations on "interest analysis" that incorporate some aspects of those approaches discussed *supra* and that introduce alternative considerations. *See, e.g.*, D. CAVERS, THE CHOICE OF LAW PROCESS (1965); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966). *See generally* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, GENERAL PART (1967). For an eclectic approach, see Note, *Extraterritorial Application of United States Law: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1025-29 (1976).

Currie's approach is singled out for comparison to Baxter's approach for two reasons: (1) Currie and Baxter both have articulated their interest analysis methods more extensively than other commentators; and (2) other versions of interest analysis either employ similar concepts to those used by Currie and Baxter or advocate solutions without adequate justificatory force.

[106] Currie describes his approach to the determination of the appropriate rule of decision in a given case as follows:

> 1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
> 2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
> 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
> 4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
> 5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Methods and Objectives, *supra* note 105, at 178. When Currie refers to a "foreign state" or to "foreign law," he is generally speaking of the interested non-forum state within the United States, not an extranational state. Currie's analysis emphasizes the determination of whether the policies underlying the forum state's rule of decision are implicated by the allegedly unlawful activity. If the forum state has a policy that would be promoted by application of the relevant rule of decision, then investigation into the policies underlying the foreign state's rule of decision is rendered unnecessary. Thus, Currie's approach ignores the foreign interests in any case that invokes the policies of the forum state to any extent.

in U.S. Supreme Court cases.[107] He contends that when the Court decides that the interests of the forum state should yield to stronger foreign state interests, "it has simply legislated."[108]

According to Currie, congressional legislation is the ideal in the interstate situation; however, his choice of forum law in true conflicts is not an attempt to approximate the legislative solution. Currie apparently considers the ideal unapproachable for a court acting unilaterally.[109] Thus, the only appropriate resolution is an application of the law of the forum with which the court is most familiar. Currie advocates the application of forum law in true conflict cases because the court "can be sure at least that it is consistently advancing the policy of its own state."[110]

Currie finds little merit in negotiation between interested jurisdictions as an alternative to his choice-of-law method in true conflict cases.[111] He is uncomfortable with the possibility that some deeply rooted policy could be bargained away in exchange for collateral concessions in another case.[112] Currie recognizes a value in agreements that control cases "in which a state asserts an unsubstantial, or collateral, or predatory interest,"[113] but not in agreements that control cases involving true conflicts.[114] Currie's view ignores the existence of foreign objections or obstructions to the application of forum law.

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[107] *See Methods and Objectives, supra* note 105, at 177 (citing Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954)).

[108] *Id.* Currie explains that a "weighing" of interests is grounded in politics rather than in jurisprudence:

> I do not rail against this, nor do I intend to crusade against the usurpation. No doubt the Court has been sorely tempted, seeing problems which it believes should be solved in a particular way, and frustrated by the failure of Congress to use its power to solve the problems. I simply want the record kept straight. I want it understood that such action by the Supreme Court must find its justification in politics, not in jurisprudence, and that its decisions in this field are to be evaluated accordingly . . . .
>
> We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic precincts of conflict of laws.

Id. at 177-78.

[109] *See supra* note 108 and accompanying text.

[110] *Married Women's Contracts, supra* note 105, at 261-62 (footnotes omitted). Currie claims that the promotion of a foreign state's interests at the expense of the forum state's interests is not a good reason for applying foreign law. *Id.*

[111] *Id.* at 263-64.

[112] *Id.*

[113] *Id.* at 264.

[114] Currie does recognize, however, that international agreement may be the only alternative to domestic determination. "[S]ince the international agreement is the only method available to independent, sovereign states for the resolution of true conflicts of interest, the limitations of that method may help to explain why continental legal systems have adhered so persistently to the ill-fated efforts to find a metaphysical system for resolving those conflicts." *Id.*

Many commentators criticize Currie's formulation,[115] but for the purposes of this discussion, its primary fault is its inapplicability to international conflicts. First, Currie's ideal in the interstate context is congressional legislation. There is no corresponding body available in the international sphere. Second, because courts are restricted to individual cases, judicial analysis does not attempt to promote the ideal. Third, Currie's approach provides no limitation to the *Alcoa* effects test.[116] If a U.S. court has subject matter jurisdiction over the action, then the action must implicate a U.S. interest.[117] A finding that a U.S. court has jurisdiction obviates any inquiry into the interests of another jurisdiction. If a court applies Currie's approach, then it will always apply U.S. law, whether the conflict is false (no foreign interest) or true (both U.S. and foreign interests implicated to some extent). As applied to antitrust cases involving conduct abroad, Currie's method is tantamount to the *Alcoa* effects test. If U.S. commerce is affected, then the court can exercise jurisdiction and apply U.S. law. Thus, Currie's approach, as applied to extraterritorial antitrust enforcement, is a mechanical device for determining the applicability of U.S. law. It provides litigants with predictable results and promotes the consistent development of local law, however, it also produces several difficulties in modern international law.

In the international economic context, compromise is both necessary and appropriate. In the long run the United States can only promote the policies behind its antitrust laws if it can harmonize its efforts with those of foreign jurisdictions. If the United States avoids consideration of substantial foreign interests and refuses to compromise its own interests, it will be unable to further even those policies that compromise would leave intact. Thus, Currie's mechanical approach to interest analysis is inadequate to deal with the problem of determining whether to apply U.S. antitrust law extraterritorially. Baxter's approach, also proposed primarily in the interstate conflict of laws context, recognizes the need for compromise. As such, it presents a superior method for the resolution of true conflicts in the extraterritorial application of U.S. antitrust law.

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[115] *See generally* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW, GENERAL PART 63 (1967). *See also* Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

[116] *See supra* notes 18-33 and accompanying text.

[117] For a discussion of the threshold subject matter jurisdiction issue, see *supra* note 55.

B. BAXTER'S COMPARATIVE IMPAIRMENT APPROACH

In 1963, William F. Baxter criticized Currie's approach to true conflicts, and applied the concept of comparative impairment interest analysis to interstate conflict of laws cases.[118] In approaching a true conflict, Baxter identifies the relevant state interests and assesses the extent to which the application of one state's law would impair the other state's objectives.[119] The court applies the law of the jurisdiction whose interests would be most impaired by application of foreign law.[120] Although Baxter proposed the comparative impairment approach to interest analysis in the interstate conflict of laws context, his justificatory arguments are sufficiently robust to apply to international conflicts over the extraterritorial reach of sovereign laws.[121]

Baxter identifies two types of governmental objectives underlying rules of decision: internal objectives and external objectives.[122] Internal objectives resolve private conflicts arising from wholly local activity.[123] Such objectives prioritize local private interests.[124] They are manifest in the rules of decision, both statutory and common law, that resolve controversies between domestic actors.[125] When a controversy involves foreign parties, the internal objectives underlying the rules do not provide a resolution. External objectives are implicated.[126] External objectives apply the legal ordering used in domestic conflicts to conflicts between a domestic party and a foreign party. They do not extend automatic protection to a domestic party simply because it is domestic. Instead, the external objectives protect the domestic party to the same extent that they would protect that party in a wholly domestic dispute.[127] Thus, if the internal objectives would not protect the domestic party in a wholly domestic suit, the external objectives will not seek to protect the domestic party against a foreign claimant.

This separation of interests into essentially identical internal and external components, while a useful analytical tool, does not resolve the conflict inherent in determining the law applicable in a dispute between two parties of different nationalities. Each nation involved in the dispute has an external objective to protect its own citizen. The external objective may be minimal, or it may be strong, depending upon the degree of protection afforded the domestic actor in a wholly domestic dispute. Resolution of any true conflict requires the subordination of one or more governments' external objectives to those of another government.[128] Baxter advocates the resolution of these conflicts through a comparative impairment method. The court assesses the effect which each nation's law has upon the domestic interests of the other nation. The court applies the law which least impairs the other nation's internal objectives. According to Baxter, it is possible to "apply a normative principle to determine which external objective to subordinate. The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand."[129] Such an investigation "may be regarded as the measure of the rule's pertinence and of the state's interest in the rule's application within the class of conflicts."[130]

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[118] Baxter, *supra* note 115.

[119] *Id.* at 17-18.

[120] *Id.*

[121] Baxter, in his present role as Assistant Attorney General in charge of antitrust, has suggested publicly that conflict of laws interest analysis is superior to the *Timberlane* factor test in tempering the extraterritorial application of the antitrust laws. *See supra* notes 98-104 and accompanying text.

[122] Baxter, *supra* note 115, at 17.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

It is important to clarify what the Baxter test does not attempt to do. First, the test does not rank the competing objectives. Unlike the suggestions from other conflict of laws commentators,[131] Baxter's test does not prioritize each nation's internal, and inherently subjective, interests and require the court to make the pretense of objectively deciding which interests are paramount. Baxter argues that this "super-value judgment" is not appropriate for judges from one of the interested nations.[132]

Baxter's approach merely assesses the *impairment* of interests which are presumed to be equal. Each nation's implicated interest is presumed to be equal with the other's, and the test addresses the degree to which the application of one law will impair the other nation's interest. Thus, Baxter's comparative impairment approach does not attempt to prioritize the competing national objectives in a conflict of laws case; rather, it attempts to select the law which minimizes the impact on the objectives.[133] Under Baxter's approach, the application of one nation's law does not signify that the interest which it promotes is more important than its competitor's, but rather, that its impact on the other nation is less than the impact of the competitor's law on its objectives.[134]

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[128] *Id.*

[129] *Id.* at 18-19.

[130] *Id.* at 9.

[131] *See supra* note 105.

[132] Baxter, *supra* note 115, at 5, 22-23.

[133] *See supra* text accompanying note 129.

Baxter admits that the application of his method to borderline cases will be difficult. He contends, however, that many legal tests are subject to the same criticism.[135] The jurisdictional rule of reason, for example, promotes an even broader and more difficult examination than does Baxter's approach to achieve the same result—the principled limitation of the *Alcoa* effects doctrine.

A mechanical rule is easier to apply than a comparative impairment approach, but it often defeats policy goals solely because of fortuitous circumstances. Mechanical rules emphasize the goals of uniformity and predictability, or protection of party expectations. Such objectives fail to take into account "the normative criterion of implementing state policies."[136] Choice doctrines with uniformity objectives implicate three concepts: primary predictability, secondary predictability and doctrinal uniformity.[137]

The goal of primary predictability seeks to enable actors to predict the legal consequences of their conduct at the time of performance.[138] Secondary predictability refers to the ability to predict the consequences of past conduct in a particular forum.[139] Doctrinal uniformity occurs when all possible forums would choose the same rule of decision in a given case.[140] Any choice method uniformly applied can achieve these goals; only extremely rigid mechanical choice rules, however, would be superior to the application of normative criteria.[141] Baxter's comparative impairment method will serve these goals; the application of normative criteria, however, subordinates the goals to the objective of minimizing the impairment of state objectives.

Currie contends that the application of normative criteria in a choice rule is never appropriate for a court.[142] Baxter rejects this contention: "The question 'Will the social objective underlying the [State] X rule be furthered by the application of the rule in cases like the present one?' need not necessarily be answered 'Yes' or 'No;' the answer will often be. 'Yes, to some extent.' "[143]

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[134] Baxter expressly rejects the ranking inherent in the "super-value judgment" approaches. *See supra* notes 105 & 132. He nevertheless chooses to denominate law selected by the comparative impairment test as the most "pertinent." Baxter, *supra* note 115, at 9. Despite the ranking notion connoted by the term "pertinent," this Note shall hereinafter comply with Baxter's terminology.

[135] *Id.*

[136] *Id.* at 20. *Cf.* Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1027 (1976).

[137] Baxter, *supra* note 115, at 19-21.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Traditional mechanical rules such as *lex loci contractus* or *lex loci delicti* do not satisfy the rigidity requirement because of the difficulty in characterizing a case and the ambiguity in finding the appropriate *lex loci*. *See* Baxter, *supra* note 115, at 3-4; and *Methods and Objectives*, *supra* note 105, at 173-77.

[142] *Methods and Objectives*, *supra* note 105, at 176.

This Note asserts that the comparative impairment approach to the determination of the extraterritorial application of U.S. antitrust law is superior to either mechanical rules or the jurisdictional rule of reason as an effective means of tempering the *Alcoa* effects test. An evaluation of this assertion requires analysis of a state's selection of a choice method. The following analysis is premised on the fundamental idea of a state's pursuit of its own objectives.

C. A COMPARISON OF THE JURISDICTIONAL RULE OF REASON WITH THE COMPARATIVE IMPAIRMENT APPROACH

A state confronting a true conflict has three alternatives in determining the applicable rules of decision. It may (1) promote the local interest whenever given the opportunity; (2) decide in an arbitrary, though arguably neutral, fashion which interest to promote through the application of a mechanical choice rule; or (3) assess the competing interests against normative criteria to find the most pertinent interest.[144] These alternatives can be evaluated by reference to the long-run impairment of internal objectives. The alternative that minimizes impairment is superior. Consider a jurisdiction that chooses to promote its local interest whenever possible. That jurisdiction will be able to promote its internal objectives only when it is the forum state, and only if competing states do not thwart enforcement of its judgments. Next, consider a jurisdiction which chooses an arbitrary mechanical rule. That jurisdiction will promote its objectives only in fortuitous circumstances. Normative methods, unlike mechanical rules, consider the unique factors in each individual case. In addition, normative methods are facially objective and, unlike local interest favoritism, do not alienate competing jurisdictions. Thus, normative methods are distinctly superior for determining the law applicable in a given case.

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[143] Baxter, *supra* note 115, at 22.

[144] A fourth alternative would be to take the "super-value judgment" approach, discussed at *supra* note 105. This alternative is dismissed by Baxter as follows:

> The drawbacks of this approach . . . are easily identified. The judge is required to formulate law in a much more frank and open manner than is generally thought compatible with his non-political status . . . . Necessarily a super-value judgment is disputable: the very occasion for its articulation is the existence of a contrary judgment reached by one of the contending bodies of internal lawmakers. Finally, the objective of primary predictability is not likely to be furthered. The uniformity of outcome on which it depends will exist only if the same super-value judgment is reached by all forums, consistently subordinating the same local value judgment.

See Baxter, *supra* note 115, at 5. The approach fails to distinguish between internal and external conflicts by only determining which internal resolution is best suited to an external situation. It is the only approach that has little chance of providing primary predictability because when the forum whose law is subordinated adjudicates a similar case, it is unlikely to "reach a super-value judgment in conflicts cases contrary to judgments [it] previously reached in internal cases which the approach does nothing to distinguish." *Id.* at 6. On the other hand, the application of normative criteria does distinguish external conflicts from internal ones by recognizing that each jurisdiction is primarily interested only in the parties identified with it.

Aside from the substantive superiority of the application of normative criteria, an important, though subsidiary, concern is the administrative cost of the choice rule. Always promoting the local interest is clearly costless. Mechanical rules, however, are not likely to be less costly than the application of normative criteria, because the determination of the facts necessary to apply a mechanical rule involves inquiries that most likely will be as costly as the determination of foreign and domestic interests invoked by a particular controversy. Furthermore, a court finding facts to apply a mechanical rule is not able to depend on briefs of the parties or *amici* as is a court determining what interests are invoked.

If all competing jurisdictions choose the interest that is least impaired, total impairment aggregated across all competing jurisdictions will be minimized. This method of selecting the applicable law, however, will not necessarily minimize the impairment of a single jurisdiction's internal objectives. If, for example, the relevant objectives of U.S. antitrust law are always less impaired by the application of foreign law than the objectives of foreign states are impaired by the application of U.S. antitrust law, then the use of the comparative impairment approach in all international cases will maximize the impairment of the U.S. objectives. The application of the law which least impairs the foreign state's objectives will, however, minimize the aggregate impairment of all nation's interests.

The above analysis illustrates that a state unilaterally determining a choice rule, in the general case, may not be satisfied with the comparative impairment method. Consider, however, a narrower inquiry. Assume State X is the dominant arbiter[145] of a class of conflicts implicating particular State X objectives. State X will seek to choose the choice of law rule that will minimize impairment of its objectives with respect to that class. If State X chooses to promote its objectives whenever it is the forum state,[146] it incurs the risk that states with competing objectives will thwart enforcement of its judgments, thereby impairing State X objectives. If State X chooses an arbitrary mechanical rule, then it will promote its objectives only when the circumstances are fortuitous. If, however, State X chooses to advance its objectives only when they are more pertinent, then it will dissuade competing states from attempting to thwart enforcement of its judgments by assuring those states that it will defer to foreign objectives when they are more pertinent. Because State X is the dominant arbiter of the class of conflicts, the prospects of avoiding foreign objections, and promoting State X objectives when it is most important to do so, are attractive. Thus, the application of normative criteria to that class of conflicts is the method most likely to achieve those goals.

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[145] 145. The term "dominant arbiter" denotes the state that will, in most or all cases, be the situs for the resolution of the competing objectives. *See infra* notes 146-47 and accompanying text.

[146] 146. Because State X is the dominant arbiter of the class of conflicts under consideration, it will most often or always be the forum state.

The United States is the dominant arbiter with respect to the class of conflicts implicating the objectives underlying its antitrust laws. Although in some cases the United States may suffer by not applying its antitrust laws, it will benefit in the long run from the comparative impairment approach because, as in the hypothetical above, it is the dominant arbiter of those laws. The United States must recognize the international opposition to the enforcement of the U.S. antitrust laws and the resulting limits to their international reach.[147] If the United States promotes its antitrust objectives whenever it is the forum state, it incurs the risk of further foreign blocking legislation. If it applies an arbitrary mechanical rule, its antitrust objectives will only be promoted under fortuitous circumstances. If it tempers its enforcement in a principled manner, however, it will achieve the greatest possible enforcement of those objectives. Foreign states will be less likely to block U.S. judgments because of U.S. deference to foreign objectives when they are more pertinent and the United States will be able to advance its objectives when they are most significant. A normative approach allows the United States to achieve these goals. As the dominant arbiter in the enforcement of its own antitrust laws, the United States should find a normative approach attractive.

The jurisdictional rule of reason and Baxter's comparative impairment approach are alternative normative tests for determining the law applicable in a particular case. Three criteria provide the standards for assessing these alternative methods: (1) The method should provide the benefits that distinguish the normative approach from mechanical and other rules; (2) The method should be appropriate for application by the judiciary; and (3) The method should take into account the ideal of multilateral negotiation.

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[147] *See supra* notes 89-97 and accompanying text.

The preceding analysis identified two primary benefits which distinguish normative methods from mechanical and other rules. First, the application of normative criteria to determine the state with the more pertinent interest is more likely than the other approaches to dissuade foreign states from thwarting U.S. judgments, because the normative method compromises U.S. and foreign objectives in a reasonable manner, thereby accommodating foreign objections. Second, by choosing U.S. objectives when they are most pertinent, the United States promotes its internal objectives in the cases where the United States most strongly desires to regulate conduct. Because the jurisdictional rule of reason is a broader test than the comparative impairment test,[148] it constitutes a greater threat to each benefit of the normative approach. The jurisdictional rule of reason does not focus on internal objectives. Rather, internal objectives are only one component of a multifaceted analysis.[149] Thus, when factors other than the conflict between U.S. and foreign policies weigh in the analysis, the jurisdictional rule of reason applies normative criteria to considerations other than internal objectives. The comparative impairment approach focuses exclusively on the internal objectives of the competing jurisdictions. Because the end result of the analysis is the decision whether to apply U.S. law, the primary impact of the analysis is on the internal objectives underlying that law. Foreign objections arise from the conflict between U.S. and foreign internal objectives.[150] The comparative impairment approach directly confronts foreign objections and better accommodates them. Therefore, the comparative impairment approach is more likely than the jurisdictional rule of reason to dissuade foreign states from creating obstacles to the promotion of United States objectives, the first benefit of the normative approach.

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[148] *See supra* notes 101 & 103 and accompanying text.

[149] In addition to a consideration of internal objectives, the courts establishing the jurisdictional rule of reason have named several other criteria. *See supra* notes 51, 60 & 65 and accompanying text.

[150] *See supra* notes 88-97 and accompanying text. Consider each of the four sources of conflict which give rise to foreign objections to the extraterritorial application of U.S. antitrust law. *See supra* text accompanying note 89. A case implicates the first source (different remedies to effect similar policy objectives) only when the foreign state's objectives are affected by the case's outcome. The different legal approach to the promotion of that interest will create conflict. The second source of conflict (differing policy objectives) arises only when the foreign state's policy objectives will be impaired by application of U.S. law. The third source of conflict (economic conflicts of interest) will arise only when the foreign state expresses an economic interest through policy objectives underlying its rules of decision. Likewise, the fourth source of conflict (different views of the reach of sovereign jurisdiction) will arise only when a U.S. court impairs the internal objectives of the foreign state. The objectives underlying the foreign laws, as indicated by legislative histories, etc., will be the sole expression given by foreign states to signal to the U.S. court their objection to the application of U.S. law. Although, as regards to the third and fourth sources of conflict, one can attribute to a foreign state a desire to protect its citizens from penalties imposed by a U.S. court when the activity invoking the penalty *does not* adversely affect the foreign state's interests, this Note takes the position that such a desire does not, as a general proposition, comport with notions of sovereignty and therefore should be ignored. Clearly, consideration of such a desire is extralegal and is, therefore, beyond the reach of a United States court conscious of separation of powers limitations.

For similar reasons, the comparative impairment method is more likely to advance the second benefit of the normative approach. By focusing exclusively on internal objectives, the comparative impairment approach promotes those objectives when they are most pertinent. To the extent that the jurisdictional rule of reason considers factors other than the conflict between United States and foreign objectives, the method risks (1) choosing to apply foreign law when the U.S. interest is most pertinent, and (2) choosing U.S. law when the foreign interest is more pertinent. These two errors defeat the second benefit of the normative approach.

The second criterion for assessing the jurisdictional rule of reason and the comparative impairment methods involves their implementation by the U.S. judiciary. Both methods require judicial application. The U.S. judiciary is competent to interpret rules of decision and analyze internal objectives, but is not competent to engage in international economic policy-making.[151] The broad inquiry under the jurisdictional rule of reason requires the court to make determinations which are in the purview of the executive branch of the federal government.[152] The comparative impairment approach requires the court to focus exclusively on determinations which the judiciary is competent to make.[153] Thus, implementation of the comparative impairment approach is more appropriate to the United States separation of powers concept.

The third criterion requires an assessment of the extent to which the methods under consideration take into account the ideal resolution of the problem. The ideal resolution of true conflicts over the extraterritorial application of U.S. antitrust law is multilateral agreement—sovereigns negotiating compromise in the promotion of internal objectives.[154] The primary impact of multilateral agreements on the extraterritorial reach of laws would be on the internal objectives underlying those laws. The comparative impairment approach focuses exclusively on the elements to be negotiated, while the jurisdictional rule of reason considers a broader range of factors. Furthermore, the comparative impairment approach forces foreign litigants and foreign governments to frame internal objectives, an activity necessary as a prelude to negotiation.

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[151] *See supra* note 100 and accompanying text.

[152] Consideration of the possible effect of the exercise of jurisdiction on U.S. foreign relations, *see* text accompanying *supra* note 60, for example, is clearly not within the court's competence. Rather, it is a concern belonging exclusively to the executive branch.

[153] As in purely domestic cases, the analysis is within the court's competence. *Cf. supra* note 108.

[154] For Currie's criticism of international agreement in the resolution of conflicts, see *supra* notes 111-14 and accompanying text. Currie admits that despite the problem of compromising objectives, international agreement is the only method available to sovereigns for resolution of conflicts. *See supra* note 114.

Baxter's writings advocate a bilateral negotiation process, which he describes as follows:

In summary, a sovereign which is the dominant arbiter of a class of true, international conflicts, is more likely to minimize impairment of its internal objectives if it chooses a conflicts rule that applies normative principles. The United States, as the dominant arbiter of its antitrust law, should choose the comparative impairment approach over the jurisdictional rule of reason. In the long run, accommodating foreign objections by application of the comparative impairment approach will result in the maximum promotion of U.S. interests. It will forestall blocking legislation, force governments to frame their national interests, and set the stage for multilateral negotiation.

> Each [sovereign] at the outset might unreasonably demand application of its law in every situation having any contact with its state. But as each became aware that the other had roughly equal bargaining power and tactical skill, the usual fruits of negotiation would emerge: each would cautiously give up what it wanted less to obtain what it wanted more, each side's perception of its own self-interest and of the other's objective would sharpen, and the final agreement would approximate maximum utility to each. In the course of negotiations the participants would realize the basis of this particular conflict . . .: the lawmakers had allocated differently certain costs of civilized society.

Baxter, *supra* note 115, at 7.

Several other commentators propose negotiation for conflict resolution and discard the unilateral approach.

Miller suggests that studies be undertaken by groups of nations to "serve as a factual basis for cooperative action against restrictive practices in international trade." Miller, *Extraterritorial Effects of Trade Regulation*, 111 U. Pa. L. Rev. 1092, 1115 (1963). Sanford states that in disputes between governmental policies:

> [i]t is inappropriate for one of the governments involved in the policy conflict to seek to impose its desired solution by invoking its domestic law before its tribunals to adjudicate the legality of conduct in another jurisdiction. The difference should be resolved, as are other intergovernmental differences, by consultation and negotiation.

Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 Cornell Int'l L.J. 195, 201 (1978). *See generally* W. Fugate, Foreign Commerce and the Antitrust Law 460-66 (2d ed. 1973); A. Ehrenzweig, Private International Law, General Part 27-47 (1967).

Tsoris contends that a unilateral approach is inherently inadequate, and a multilateral approach is unlikely for the present. Thus, "bilateral agreements between the United States and concerned nations present the most attractive alternative." *See* Note, *supra* note 94, at 447.

Rahl suggests that international conflicts be submitted to the International Court of Justice. H. Rahl, Common Market and American Antitrust 411-13 (1970). *See also* McClelland, *Toward a More Mature System of International Commercial Arbitration*, 5 N.C. Int'l L. and Comm. Reg. 169 (1980) (proposing new methods of settling international contracts disputes).

D. THE COMPARATIVE IMPAIRMENT APPROACH APPLIED

Baxter's comparative impairment method relies strongly on the analysis of the facts of each individual case.[155] A complete explanation of the method requires examples. Before proceeding to the examples of a false conflicts case, cases where one nation's interests predominate, and a borderline case, some conclusions may be stated. First, the comparative impairment method is difficult to implement in borderline cases—cases "that thwart easy application of every principle of law."[156] In such cases, "[t]he judge decides on the basis of some marginal factor and justifies his decision as best he can . . . ."[157] Baxter contends that this fate for borderline cases is preferable to the application of a mechanical rule.[158] Second, in all true conflicts where one state's objectives are obviously more pertinent, the application of the comparative impairment method will achieve the most desirable result, measured by normative criteria.[159] Third and finally, the comparative impairment approach highlights false conflicts and mandates the quick resolution of such cases according to the relevant normative factors.[160]

1. False Conflict Example

A Swiss corporation and a U.S. corporation both manufacture widgets for sale in the United States. The U.S. corporation imports widgets from its wholly-owned European subsidiary. The Swiss corporation exports to the United States from its wholly-owned subsidiary located elsewhere in Europe. In Switzerland the Swiss and U.S. corporations agree to divide the U.S. market for widgets. The Swiss corporation will supply the northeastern states, and the U.S. corporation will supply the southern and western states. Due to the cost structure and the demand curve for widgets, the Swiss and U.S. corporations supply the bulk of the U.S. demand for widgets. Because they do not compete in their respective territories, prices rise to the monopoly level. The U.S. government sues both corporations for violating Section One of the Sherman Act.[161]

In a purely domestic case, allocation of markets between competitors is a *per se* violation of the Sherman Act.[162] Because U.S. commerce in widgets is directly and substantially affected by the agreement, a U.S. court could exercise jurisdiction over the action.[163] Under the comparative impairment approach, it is necessary to determine whether the case implicates any internal objectives underlying Swiss law.

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[155] *See supra* notes 122-30 and accompanying text.

[156] Baxter, *supra* note 115, at 9.

[157] *Id. But see infra* notes 184-90 and accompanying text, where this Note proposes an alternative resolution for borderline conflicts.

[158] Baxter, *supra* note 115, at 9.

[159] *See supra* notes 144-54 and accompanying text.

[160] *See* text accompanying *supra* note 105.

[161] *See supra* note 11.

Under authority of the Federal Act on Cartels and Similar Organizations, Switzerland's Cartels Commission, on special inquiry, may prohibit an agreement that prevents competition and injures Swiss markets or consumers.[164] Unlike the United States, which has a *per se* rule against the allocation of markets between competitors, Switzerland apparently does not automatically consider market allocation agreements injurious to the Swiss public interest. The Swiss rule requires a special inquiry and a finding that the market allocation causes actual harm.[165] Thus, an implied underlying objective of the Swiss rule is to permit anti-competitive agreements that are benign to the Swiss public interest. Another, more obvious, objective of the Swiss rule is to protect Swiss markets and consumers from harmful anticompetitive agreements. In the hypothetical situation, Swiss markets and consumers are not harmed by the agreement to divide the U.S. market; therefore, this Swiss objective is not implicated.

In the above hypothetical, the widgets are neither produced nor sold in Switzerland. Swiss markets and consumers are not affected by the agreement. Therefore, the application of U.S. antitrust laws will not impair the Swiss objective. The conflict is false and the court should apply U.S. antitrust laws.[166]

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[162] *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Co., 332 U.S. 319 (1947); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

[163] *See supra* note 55. The court must always answer the threshold question of whether it has subject matter jurisdiction over the action. For the comparative impairment approach, this question is answered by reference to whether the allegedly unlawful activity has an effect on U.S. commerce sufficient to be cognizable as an antitrust violation. The determination of antitrust law subject matter jurisdiction in U.S. courts is essentially a determination of whether the plaintiff alleges facts sufficient to implicate U.S. internal objectives underlying the antitrust laws. Thus, in the case of a false conflict where the United States has no interest implicated, the court dismisses the action for lack of subject matter jurisdiction. The conflict in the text's hypothetical situation is false because it implicates no foreign objectives.

[164] OECD, COMPARATIVE SUMMARY OF LEGISLATIONS ON RESTRICTIVE BUSINESS PRACTICES 32 (1971).

[165] *Id.*

[166] For false conflicts, Currie's approach and the comparative impairment approach to interest analysis are identical. Baxter, *supra* note 115, at 3-4. Under a jurisdictional rule of reason approach, the court would find no conflict with foreign laws or policies. This, however, would not end the inquiry. Presumably, the court would find that most of the factors of comity weigh heavily in favor of the application of U.S. law. *See supra*

Foreign objections to the extraterritorial application of U.S. antitrust laws concentrate on the conflict between the U.S. law and foreign internal objectives.[167] When there are no foreign internal objectives implicated, no source for objection exists. Thus, courts should apply U.S. antitrust laws to international activity in a false conflict situation.

2. *Dominant Foreign Interest Example*

The widget producing firms in the German Federal Republic are all small to medium-sized. The primary purchasers of German widgets are U.S. manufacturers that incorporate the widgets into several finished products. The widgets represent approximately one-tenth of the cost of the finished products and must be made to order. A close substitute for German widgets is available in the United States and the U.S. manufacturers use it in ten percent of the finished products.

The German firms agree to divide the U.S. market and allocate primary purchasers exclusively to certain firms. Such an agreement ordinarily violates Section One of the Republic's Act Against Restraints of Competition.[168] Section 5b of the Act,[169] however, permits agreements in restraint of trade if they promote efficiency in small or medium-sized firms.[170] Pursuant to Section 5b, the German firms file a notification of their agreement with the cartel authority.[171] They present convincing evidence to the cartel authority that the allocation of U.S. market subdivisions is required to avoid inefficiencies that would render their businesses unprofitable. Each firm would require equipment modifications if they had to compete for short-term contracts on made-to-order widgets from multiple pur-

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notes 51, 60 & 65 and accompanying text. The factors concerning (1) the relative significance of the effect on U.S. commerce compared to the effect abroad, (2) forseeability of the effect on U.S. commerce, and (3) intent to harm U.S. commerce suggest, for example, that U.S. law should be applied in this case. On the other hand, factors such as (1) whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances, and (2) nationalities of the parties, are ambiguous. Such inquiries are extralegal and, therefore, are not within the competence of the court. Furthermore, proponents of the jurisdictional rule of reason provide no justification for the relevance of comity factors such as the availability of a remedy abroad. Therefore, the broader inquiry under the jurisdictional rule of reason is, without justification, more difficult to apply than is the comparative impairment analysis, and is more likely to result in error.

[167] *See supra* note 150.

[168] Act Against Restraints of Competition, § 1, BGB I, I.S. 458 (as amended Apr. 26, 1980).

[169] *Id.* at § 5b.

[170] Permitting such agreements is termed "rationalization" of the economic activities. *Id.*

[171] *Id.*

chasers throughout the United States. These equipment modifications would be inefficient.

Several U.S. purchasers are unable to obtain contracts from German firms that charge lower prices to other purchasers. They institute suit against the cartel organization and each of the member firms. In a wholly domestic case, market allocation agreements between competitors in the United States are *per se* illegal.[172] The agreement significantly affects U.S. commerce in widgets and the end-products incorporating widgets. Thus, the threshold inquiry supports the exercise of jurisdiction by the courts.[173]

In this situation, the U.S. antitrust laws seek to protect U.S. widget purchasers from monopoly pricing or supply restriction which may result from the German market allocation agreement. The German competition law seeks to protect both small and medium-sized firms from ruinous competition. Because both the United States and the Republic have internal objectives implicated in this situation, the U.S. court must compare the potential impairment to determine which country has the most pertinent interest.

On these facts, the German interests are more pertinent and the court will not apply the U.S. antitrust laws. This result is reached by hypothesizing the application of each law and testing its effect on the internal objectives of the other nation.[174] After performing this comparative impairment test, the court selects the law which least impairs the internal objectives of the other nation.[175]

The application of the German law, allowing the market allocation agreement, will not significantly affect the U.S. internal objectives. Allowing the market allocation agreement is unlikely to promote monopoly price levels or reduced supply in U.S. markets. The size of the producing firms suggests that entry into the widget industry does not require substantial capital investment. Thus, the potential for entry is high if the German firms begin to extract monopoly profits from the sale of widgets in the United States. New producing firms will enter the widget market, attracted by the monopoly price. This increased competition will tend to reduce the price to competitive levels. Additionally, production and demand substitution factors will combine to diminish the potential for reduced supplies in U.S. markets. Because widgets are made to order, the German firms are unlikely to restrict supply to raise prices. Furthermore, some German firms charge lower prices to their U.S. market subdivisions suggesting a high demand price elasticity in certain sectors of the U.S. market, possibly arising from the closeness of the widget substitute. These market conditions diminish the potential for harm to U.S. purchasers.

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[172] *See supra* note 162.

[173] *See supra* note 55.

[174] *See supra* text accompanying notes 122-30.

[175] *See supra* text accompanying note 129.

Conversely, applying the U.S. antitrust law, and thus disallowing the market allocation agreement, will significantly affect the German internal objectives. Assuming the U.S. court applies an effective enforcement mechanism, it will thwart the German interest in protecting small businesses from ruinous competition. Because the United States is the primary market for German widgets, enforced competition among German firms for United States purchase contracts will produce the same inefficiencies suffered by the producers before their agreement. The very harm that the German exemption seeks to avoid will occur. Thus, whereas the impairment of the U.S. protective interest is likely to be insubstantial if the court abstains from exercising jurisdiction, the German protective interest will be totally impaired by application of the U.S. law. The comparative impairment method would operate to choose abstention.

The above hypothetical illustrates the sacrifice that the comparative impairment method imposes on U.S. objectives.[176] This Note proposes that in a case such as this one, where the foreign interest is more impaired than the U.S. interest, a U.S. court should decline jurisdiction. Foreign objections to the extraterritorial application of U.S. antitrust law are strongest when the foreign objectives are more pertinent.[177] Deferring to foreign objectives when they are more pertinent, therefore, removes the source of the strongest foreign objections. By sacrificing less pertinent U.S. interests, the court accommodates foreign objections, and dissuades the foreign state from attempting to thwart U.S. objectives. By focusing exclusively on internal objectives, the comparative impairment method makes the optimal trade-off. The method impairs United States objectives when the U.S. interest is less significant, while it accommodates those objectives when they are strongest.

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[176] Under Currie's approach, the court would apply U.S. antitrust law to the hypothetical case because the activity implicates U.S. objectives. *See supra* text following note 117. The disposition of this case under the jurisdictional rule of reason is uncertain. The conflict between United States and German policies weighs in favor of abstention. The intended, forseeable effect on United States commerce, however, weighs in favor of the application of U.S. antitrust law. Thus, a reasonable consideration of the comity factors could result in the application of U.S. law. The comparative impairment analysis reveals that, focusing on the fundamental concern of internal objectives, the U.S. interest should yield to the more pertinent German interest. The broad inquiry under the jurisdictional rule of reason fails to give a court sufficient guidance in the determination. Because foreign objections are rooted in foreign internal objectives, the dispersion of the court's focus under the jurisdictional rule of reason is inappropriate to the reasonable accommodation of foreign objections. Furthermore, the uncertainty of the result under the jurisdictional rule of reason supports the proposition that the method "is simply an open invitation to the court to decide for itself." *See supra* note 100 and accompanying text. Thus, the jurisdictional rule of reason casts the court in a policy-making role. Such a role is outside the court's competence, whereas, when applying the comparative impairment method, the court is exercising the judicial function of analyzing the objectives underlying competing rules of decision.

[177] For an analysis of the interrelation between foreign internal objectives and the extraterritorial application of the United States antitrust laws, see *supra* note 150.

3. *Dominant United States Interest Example*

An Austrian firm produces various types of widgets for sale to wholesalers for worldwide distribution. The firm imposes minimum retail selling prices, withholding supply to any wholesaler reselling to a retailer that undercuts the price.[178] Thus, U.S. retailers must agree to observe the minimum retail price in order to purchase the Austrian widgets, and wholesalers must agree to sell only to the retailers observing the minimum price. One U.S. retailer advertises and sells widgets below the minimum price; the Austrian firm and all wholesalers subsequently refuse to supply the retailer. The U.S. government initiates a suit against the Austrian firm and all U.S. wholesalers based upon the excluded retailer's complaint.

The Austrian firm's activity would be a violation of the Sherman Act in a wholly domestic case.[179] Austrian law, however, permits verticle price maintenance, subject to cartel registration. The Cartel Court grants registration if it finds the activity "justified from the point of view of the national economy" and finds the prices not to be excessive.[180] In this hypothetical, the Cartel Court sanctioned the arrangement.

On these facts, the U.S. interests are more pertinent than the Austrian and the court will apply the U.S. antitrust laws. This result is reached by hypothesizing an application of each law and testing its effects on the internal objectives of the other nation.[181] After this comparative impairment test, the court selects the law which least impairs the internal objectives of the other nation.[182] If the U.S.

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[178] For a discussion of the profit-making goals behind retail price maintenance, see Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966); Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J. LAW & ECON. 86 (1962).

[179] *See* United States v. Parke, Davis and Co., 362 U.S. 29 (1960).

[180] Austrian Cartels Act of November 22, 1972, § 24. The Austrian law explicitly exempts from its purview cartels relating to foreign markets. *Id.* at § 5(1)2. The meaning of the exemption, however, is unclear. If the wholesalers in this hypothetical situation are Austrian, then the Act may apply regardless of the effect on foreign markets. The discussion in the text assumes that the Act applies.

[181] *See supra* text accompanying notes 122-30.

[182] *See supra* text accompanying note 129.

court declines jurisdiction, domestic retailers could agree with wholesalers to fix the U.S. retail price for Austrian widgets, impairing the U.S. objectives of protecting consumers and promoting competition. The U.S. law seeks to protect U.S. consumers from the pernicious effects of price fixing and to promote competition among retailers to effect the efficient allocation of resources.

The Austrian Cartels Act provides for registration of retail price maintenance agreements so that if the Cartel Court finds that the Austrian economy would not be adversely affected, an Austrian manufacturer can benefit from such an agreement. In this case, the Austrian firm produces for worldwide consumption. Thus, if the court exercises jurisdiction and applies U.S. antitrust law, any remedy will affect only part of the Austrian firm's retail market. Furthermore, the remedy will not affect the Austrian firm's price to U.S. wholesalers. Thus, if the court applies U.S. antitrust law, the benefit of retail price maintenance to the Austrian firm will not be completely lost. Correspondingly, the Austrian objective of benefiting certain manufacturers will not be completely impaired. Therefore, the court's abstention would impair U.S. interests more than its exercise of jurisdiction would impair Austrian interests. By comparative impairment analysis, the court should apply U.S. antitrust law.

In any true conflicts case, one jurisdiction's objectives prevail. As the dominant arbiter of conflicts implicating antitrust law objectives, the United States seeks to minimize impairment of those objectives. To pursue that goal through unilateral judicial resolution of conflicts, the United States must apply a choice method that contemplates the potential for impairment resulting from foreign objections. The comparative impairment approach focuses on the source of foreign objections and provides a choice criterion which is appropriate for judicial application. The approach chooses to impair the least pertinent objectives; therefore, it chooses to defer to foreign objections when impairment of those objectives would evoke the strongest objections. Likewise, the comparative impairment method chooses U.S. law when the source of foreign objections is weakest. Thus, the choice of U.S. law in this case, on the basis that the U.S. interest is more pertinent, is a trade-off of foreign objections for the realization of U.S. objectives. The choice is the result of a rational analysis of the competing interests. The comparative impairment approach, unlike the alternative choice doctrines, recognizes both the trade-off involved in the determination and the limits of judicial competence.[183]

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[183] Currie's approach to interest analysis would also choose to apply U.S. law in this situation; however, the analysis ignores the fundamental concern with internal objectives.

4. Balanced Interest Example

Borderline cases arise whenever a choice doctrine applies normative criteria. Under the comparative impairment approach, courts will face cases in which the respective interests appear balanced. The interests are balanced if each state's underlying objectives are equally impaired by application of the other state's rule of decision. In the context of U.S. antitrust laws, the interests are balanced if application of the U.S. antitrust laws will impair foreign objectives to the same extent that abstention will impair U.S. objectives.

In a true conflict where the respective state interests are balanced, the comparative impairment method does not provide a solution. Neither applicable law will minimize the impairment of internal objectives. This Note proposes that when interests are balanced in antitrust cases, the United States should mechanically apply its own law. No other nation desires to enforce the U.S. antitrust laws. As the dominant arbiter, the United States must apply a normative conflict of laws rule. Nevertheless, the dominant arbiter may, in limited circumstances, such as borderline cases, satisfy a secondary conflict of laws goal. The application of the law of the forum in borderline cases will allow litigants to predict, prior to their activity, which law will apply.[184]

The application of a mechanical rule applying U.S. antitrust law in balanced interest cases raises two questions. First, is a mechanical rule appropriate? A normative criterion that uniformly serves some U.S. objective obviates the need for a mechanical rule. No such normative criterion commends itself in this situation because U.S. courts are not competent to formulate or implement policies relegated to the legislative or executive branches of the federal government. Therefore, a mechanical rule is appropriate. Second, should U.S. courts apply U.S. antitrust law or should they abstain from exercising jurisdiction in balanced interest cases? Both choice rules promote predictability. The abstention rule, however, removes balanced cases from the U.S. sphere of control. Foreign states would not need to negotiate for control. The application of

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The result in this situation under the jurisdictional rule of reason is uncertain. *See supra* note 176. Thus, it is possible that the application of the comity doctrine would not result in the optimal decision in this case.

[184] *Cf.* Baxter, *supra* note 115, at 3. Baxter identifies two elements necessary for a litigant to predict the applicable law at the time of his activity. Each forum's choice of law rule must be predictable and consistent. In the instant case, a litigant bringing a balanced interest claim can be certain that the court will apply U.S. law. In addition, only U.S. courts apply the U.S. antitrust laws, so that a choice of forum will not disturb the litigants ability to predict the applicable law. *See supra* notes 137-41 and accompanying text.

U.S. antitrust laws, on the other hand, preserves the need for international negotiation. According to Baxter, multilateral negotiation is the ideal.[185] Neither mechanical rule, abstention nor application, better approximates the ideal. Thus, the rule which preserves the need for negotiation is superior. Therefore, the courts should apply U.S. antitrust law wherever the U.S. and foreign interests are equally balanced.

The following hypothetical, modelled after *In re Uranium Antitrust Litigation,*[186] illustrates a balanced interest case. In an effort to promote sales of electricity-generating nuclear reactors, a U.S. producer of nuclear reactors entered into long-term contracts with domestic and foreign utility companies to supply uranium. The U.S. corporation did not contract to purchase uranium to cover these long-term contracts. When the world price of uranium increased more than six-fold over a four year period, it was forced to renege on its contracts. The utility companies sued.

In its defense, the U.S. corporation alleged that a cartel of uranium producers caused the price increase. The cartel activities were approved by the Canadian government, though no act of state was involved.[187]

To properly adjudicate the price-fixing allegations, the U.S. courts require information located in Canada. The Canadian firms, however, are disinclined to supply the necessary documents, and the Canadian government supports their refusal. United States commerce is directly and substantially affected by the cartel's alleged activity, which the U.S. corporation blames for its breach of the contracts with U.S. and foreign utility companies. Price-fixing is among the most pernicious activities covered by U.S. antitrust laws.[188] The United States, therefore, has a strong interest in acquiring the information and adjudicating the claims.

Canada desires to protect its private firms from prosecution when they are cooperating in the implementation of national economic policy.[189] Resisting U.S. efforts to obtain the information promotes that objective. The issue in this case is not whether the U.S. court should provide a remedy for the failure to produce information, but whether the U.S. court should exercise jurisdiction over the Canadian defendants.

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[185] *See supra* note 154 and accompanying text.

[186] 617 F.2d 1248 (7th Cir. 1980). *See also* lower court cases by the same name at 480 F. Supp. 1138; 473 F. Supp. 393 (N.D. Ill. 1979); Recent Developments, *Antitrust Law: Extraterritoriality*, 21 HARV. INT'L L.J. 515 (1980). The Westinghouse suit charged twenty-nine defendants as conspirators. Nine defaulted, including one Canadian firm. Besides Canada, the other foreign nations identified with defendants are Australia, South Africa, Switzerland, and the United Kingdom. The hypothetical in the text is confined to the United States-Canada conflict.

[187] In *In Re Uranium Antitrust Litigation*, the court stated: "While the governments of the foreign participants in this alleged conspiracy are acting and admittedly sympathetic to the economic determinism of the defaulters, there is no claim that the alleged conduct of the defaulters is mandated by these governments." Therefore, the act of state defense was unavailable. 617 F.2d at 1254 n.21.

[188] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

The U.S. interest in protecting U.S. nationals from price-fixing would be totally impaired by abstention. Similarly, the Canadian interest in protecting the private sector from penalties for pursuing Candian national economic interests would be totally impaired by the application of U.S. antitrust laws. A U.S. court applying the comparative impairment method would find the respective internal objectives equally balanced. Therefore, the court would use the mechanical rule and choose to apply U.S. antitrust law. There is no basis for finding that either abstention or the application of U.S. law would better approximate the negotiation results. If the U.S. court abstained from exercising jurisdiction in this borderline case, it would be allocating control over borderline cases to Canada. Canada would have nothing more to gain with respect to borderline cases implicating U.S. antitrust law objectives. Therefore, the decision would obviate negotiation for control over that class of cases. The application of U.S. law in this situation, however, preserves the need for negotiation because the United States retains control, at least to the extent that U.S. enforcement mechanisms are effective. Both the United States and Canada could benefit from negotiating over control because both could exchange less desirable spheres of control for more desirable ones. This in turn would maximize the scope and impact of their respective internal objectives. Thus, when the court chooses to apply U.S. antitrust laws, it preserves the potential for a resolution of the conflict through negotiation.[190]

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[189] Sanford, *The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad*, 11 CORNELL INT'L L.J. 195, 205-06 (1978). Sanford, the Director General, Bureau of Commercial and Commodity Relations, Department of External Affairs, Ottawa, states:

> Canada and the United States provide information to each other freely in the course of consultation and negotiation to the extent that their laws permit . . . . What, then, is the element in the request for information about uranium marketing, for example, that sets it apart and leads normally cooperative governments to resist [United States] efforts to obtain information? I believe the answer is that . . . unlike normal judicial assistance, this request concerns a proceeding that the requested governments have reason to believe may be inimical to their national interests. To be more specific, if the Canadian Government transmits or permits the transmission of information from Canada to the United States to assist the prosecution of persons or corporations for acts done outside the United States at the request or encouragement of the Canadian Government, then the next time Canada seeks similar cooperation from the private sector of the Canadian economy in the implementation of national economic policy, it must expect the multinationals in Canada first to seek the advice of their [United States] legal counsel, and then to comply with the Canadian request only if compliance will not expose them or their [United States] affiliates to legal proceedings in the United States. Consequently, if the Canadian Government is not prepared to accord what protection it can to private firms prosecuted abroad for complying with Canadian policy, it cannot reasonably expect the future cooperation of those firms in carrying out measures it judges to be in the Canadian economic interest. The private sector would thus become more responsive to [United States] law than to Canadian law and policy in determining whether and to what extent it would act in the Canadian interest. This is not a result that a foreign government can accept.

Sanford suggests that if the United States ignores the Canadian interest, future cases will meet with blocking legislation or other direct governmental intervention in order to establish appropriate sovereign defenses to the extraterritorial application of U.S. antitrust law. *Id.*

III

INTEREST ANALYSIS AS A PRELUDE TO MULTILATERAL NEGOTIATION

The international economic environment contains neither an independent arbiter for disputes nor a regulatory institution. Negotiation is, as a result, the optimal method to resolve conflicting internal objectives raised by international commercial activity.[191] Negotiation provides a constructive resolution to these conflicts. National hegemony over and retaliation against certain resolutions of conflicts, on the other hand, are destructive.

A sovereign's bargaining power reflects the extent to which it could promote its interests unilaterally. In negotiations, each sovereign uses that bargaining power to extend its interests by exchanging less desirable spheres of control for more desirable ones. Therefore, through negotiation, each sovereign maximizes the extent of its interests.

In the absence of negotiation, each sovereign provides a mechanism for resolving conflicts. In the United States, the judicial system provides the process. Its limited competence restricts the choice of a conflicts resolution doctrine.[192] The comparative impairment approach, which identifies internal objectives and assesses the pertinence of competing states' interests, is appropriate for judicial application.[193] In addition, this approach takes into account the ideal of negotiation.[194]

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[190] The effect of the mechanical rule in borderline cases is to create a presumption in favor of the application of U.S. antitrust law. The rule only applies, however, when comparative impairment analysis fails to provide a solution. Thus, the rule does not create a presumption that U.S. objectives are more pertinent. The steps in the analytical process proposed in this Note must remain independent if the process is to honor the rationale justifying it. First, the court determines whether the case implicates any foreign objectives. Second, the court compares the potential impairment of United States and foreign objectives by either the abstention from or exercise of jurisdiction, respectively. Third, if and only if systematic examination reveals that United States and foreign objectives are equally pertinent, the court applies the mechanical rule and chooses to exercise jurisdiction and apply U.S. antitrust law.

[191] *See supra* note 154 and accompanying text.

[192] *See supra* notes 151-53 and accompanying text.

Actual negotiation involves a face-to-face confrontation; a court, however, must act unilaterally. Judicial conflict resolution is not a close substitute for the ideal of negotiation. In a negotiation, two sovereigns might agree to resolve two classes of conflicts by ceding one sphere of control to the other. A court, however, must resolve a conflict in a single case. If the court considers the sovereigns' internal objectives, it will, at least, consider the appropriate subject matter. The competing objectives would be the focus of negotiation. In addition, the comparative impairment approach forces foreign nations to frame their national interests, a necessary prelude to negotiation. Finally, the adoption of the comparative impairment test may signal a serious U.S. effort to temper the extraterritorial application of its antitrust laws and promote a spirit of international negotiation. The comparative impairment approach for the resolution of conflicts is, therefore, both an appropriate doctrine for judicial application and an approach calculated to take into account the negotiation ideal. The alternative doctrines considered in this Note do not share these two qualities.

The *Alcoa* effects doctrine does not consider competing internal objectives.[195] Currie's approach to interest analysis,[196] and other mechanical choice doctrines,[197] also ignore competing objectives. The jurisdictional rule of reason requires the court to consider factors inappropriate to judicial determination.[198] Thus, the comparative impairment method is a superior doctrine for unilateral conflict resolution in the United States, where the judicial system provides the process by which actors can invoke sovereign interests.

CONCLUSION

U.S. courts currently apply the *Alcoa* effects doctrine and the jurisdictional rule of reason in various forms when determining the extraterritorial application of U.S. antitrust law. Both methods of analysis are deficient. The *Alcoa* doctrine does not consider foreign objections to the extraterritorial application of U.S. antitrust law and prompts foreign legislation blocking discovery and enforcement of United States judgments. The jurisdictional rule of reason requires the courts to engage in inquiries outside of the realm of judicial competence.

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[193] *See supra* note 153 and accompanying text.

[194] *See supra* note 154 and accompanying text.

[195] *See supra* notes 18-33 and accompanying text.

[196] *See supra* notes 106-17 and accompanying text.

[197] *See supra* notes 136-41 and accompanying text.

[198] *See supra* notes 151-53 and accompanying text.

The comparative impairment approach provides significant improvements over both the *Alcoa* effects test, and the jurisdictional rule of reason. The comparative impairment approach accommodates foreign objections by considering the competing objectives implicated in an individual case and applying U.S. law only when the U.S. interest is more pertinent. This approach confines the judicial inquiry to identification and assessment of the internal objectives underlying the laws and policies of the respective jurisdictions, a task particularly within the realm of judicial competence.

Multilateral negotiation is the ideal method for resolving conflicts. Through negotiation each jurisdiction can maximize the extent of its interest by trading less desirable spheres of control for more desirable ones. The focus of negotiation would be the internal objectives of each sovereign. The comparative impairment approach analyzes internal objectives exclusively. It forces sovereigns to frame their national interests, setting the stage for multilateral negotiation. Thus, U.S. courts should eschew the *Alcoa* doctrine and the jurisdictional rule of reason in favor of the comparative impairment approach to interest analysis in the determination of the extraterritorial application of U.S. antitrust law.

Edward A. Rosic, Jr.

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September 18, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary of the
United States Senate
Room 224, Dirksen
Washington, D.C. 20510

Dear Senator Thurmond:

Following our testimony before your Committee on S. 397, you wrote asking us to "describe in some detail how the avoidance of conflicts with the interests of foreign sovereignties will directly benefit U.S. business." We are pleased to respond below, setting forth some examples of how U.S. companies would benefit from legislation such as S. 397. We wish to emphasize, however, that the principal benefits to U.S. companies will come to them, not in their capacities as U.S. nationals, but rather as members of the international trading community, all of whose members will be benefitted by reducing the uncertainties and frictions in international trade created by the unrestrained exercise of U.S. extraterritorial antitrust jurisdiction.

Specific Benefits to U.S. Business

We anticipate specific short-term benefits of three basic types flowing to U.S. companies as a result of S. 397. First, and most immediately, legislation such as this could reduce, in individual cases, the presently over-broad exposure to antitrust liability of United States companies engaged in international trade. This reduction in liability would occur because cases dismissed under S. 397 would be dismissed as to all defendants -- U.S. and foreign alike. As we pointed out in our written testimony presented to your Committee, U.S.

companies have been among the defendants in virtually every major conflict over the last forty years involving extraterritorial assertions of U.S. antitrust jurisdiction. Similarly, any case "de-trebled" under S. 397 would be detrebled as to all defendants. Accordingly, U.S. companies would benefit from legislation such as S. 397 insofar as it enabled them to achieve dismissal or detrebling of private antitrust actions against them that would otherwise have gone forward without limitation.

Second, apart from its effect on litigated antitrust cases, S. 397 would facilitate business planning for United States corporations considering international commercial activity. Antitrust enforcement, with its changing policies and "gray areas," creates substantial uncertainty for U.S. business in a purely domestic context; in the foreign arena this uncertainty is even greater. Besides having to grapple with the question of whether U.S. law will be applied at all to the transaction, U.S. corporate executives face additional risks when they enter into transactions with foreign companies, whose executives may not be well versed in the subtleties of U.S. antitrust law or its jurisdictional reach and who may therefore unwittingly involve their U.S. partners in antitrust difficulties. Encouraging the development of clearer limitations on the exercise of U.S. antitrust jurisdiction over international commerce would benefit U.S. businesess by making it easier for them to assess antitrust risks and weigh them against the benefits of proposed international business transactions.

The third category of near-term benefits to U.S. business from S. 397 arises from the fact that foreign nations, angered by the unbridled assertion of U.S. antitrust jurisdiction, have substantial powers to retaliate against our own multinationals. Sometimes this power is exercised legislatively, as when the British Parliament enacted the Protection of Trading Interests Act providing for "clawback" rights for all non-U.S. companies doing business in the United

Kingdom, thereby increasing antitrust plaintiffs' incentives to satisfy treble damage judgments against U.S. rather than foreign defendants. Sometimes the power is exercised administratively, as when U.S. protests about the extraterritorial reach of the EC Commission's competition proceeding against IBM were heavily discounted in Europe. But the point is the same: U.S. business is subject to a variety of different kinds of retaliatory acts by foreign sovereigns because of the unrestrained exercise of U.S. antitrust jurisdiction over international trade and commerce. S. 397 holds out the prospect of diminishing such retaliation and encouraging an even-handed approach toward U.S. companies by foreign enforcement authorities.

General Benefits to International Trade and Commerce

We have set forth above some of the specific ways in which avoidance of conflicts in international antitrust cases will benefit U.S. business. In our view, however, the most important benefits to be achieved by legislation such as S. 397 will be reaped by U.S. and foreign business alike: it will result in smoother, more efficient operation of the system of international trade and commerce.

It is a commonplace now to observe that United States dependence on international trade and commerce has grown geometrically over the last thirty years. The United States has become decreasingly insular, and our fortunes are increasingly bound up with those of our allies and trading partners. Our economic well-being, and indeed our national security, depend to a considerable degree on our ability to trade with other nations on a mutually beneficial basis.

One prerequisite of any healthy, growing system of commerce is a set of rules that prevent conflicts between trading partners from arising and provide effective means of resolving the disputes that do arise. In decisions such as Mitsubishi v. Soler (arbitrability of international antitrust disputes) and *The Bremen v. Zapata Off-Shore* (enforceability of foreign forum-selection clause), the Supreme Court has increasingly given recognition to the need for U.S. law and procedure to accommodate the evolving international legal order governing and facilitating transnational commercial activity.

At the present time, one of the greatest sources of uncertainty and friction in international commerce between the United States and its major trading partners is the aggressiveness with which the United States seeks to apply its laws outside of its territory. While the principle of "comity" -- respect for foreign law and for the needs of the international legal order -- is firmly embedded in U.S. jurisprudence, it often appears to our trading partners that we honor this principle more in the breach than in the observance. Heated disputes over extraterritorial application of U.S. law have arisen repeatedly in antitrust actions, as summarized in the written testimony that we provided to the Committee. These disputes have led to unnecessary clashes with our close allies and to substantial uncertainties on the part of U.S. and foreign businesses alike concerning their exposure in suits involving hundreds of millions or even billions of dollars. Such disruptions of international trade and uncertainties for companies participating in such trade can only harm both U.S. and foreign business.

The United States should subject the exercise of its extraterritorial jurisdiction in antitrust cases to a principle of reasonableness. S. 397, by directing the courts to apply a jurisdictional rule of reason in private antitrust cases, can improve the functioning of the international trading system, and therefore help all businesses which participate in international commerce.

Sincerely

James S Campbell

James S. Campbell

David Westin

Senator McConnell. We would like now to call on Hon. John Kingdon, of Howrey & Simon, and Hon. John Shenefield, of Milbank, Tweed, Hadley & McCloy, here in Washington, both with the American Bar Association.

STATEMENT OF A PANEL, INCLUDING: JOHN S. KINGDON, HOWREY & SIMON, WASHINGTON, DC, ON BEHALF OF THE INTERNATIONAL LAW AND PRACTICE SECTION, AMERICAN BAR ASSOCIATION; AND JOHN SHENEFIELD, MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, DC, ON BEHALF OF THE ANTITRUST LAW SECTION, AMERICAN BAR ASSOCIATION

Mr. Kingdon. Thank you, Senator.

I am John Kingdon, and I am chairman of the international aspects of antitrust law committee of the section of international law and practice of the American Bar Association.

I appreciate the opportunity to speak to S. 397 today. These comments are those of the section and should not be construed in any way as being the comments of the American Bar Association.

We have submitted, and I ask that it be a part of the hearing record, a full report of our section, detailing our position on the main provisions of S. 397.

Senator McConnell. That will be included in the record.

Mr. Kingdon. Thank you, Senator.

In the short time allotted to me, I will simply speak very briefly, highlighting those parts of our report that speak specifically to the sections.

First, section 3, the jurisdictional rule of reason section. We feel that is a desirable and necessary step toward achieving fair adjudication of these kinds of cases that raise conflicts between national and foreign interests.

Our report does not speak to any problem in the legislation because of the failure to list the criteria for balancing. We believe that balancing could be achieved on a case-by-case basis, with those decisions made by the judges involved. Speaking beyond the face of our report, I do not believe that the section would take any exception to a list of proposed criteria of the type that the Department of Justice and the Department of State might submit to this committee for consideration.

We favor the early consideration of motions to review the possible conflict between national and foreign interests. We think that early consideration of these jurisdictional matters could protect foreign sovereigns from what they might view as intrusive, overburdensome discovery, particularly in cases where, ultimately, the court might dismiss on the basis of comity. So, we feel there are strong policy reasons for accelerating that issue to the beginning of the litigation.

With respect to the provision for soliciting the views of the U.S. Government, we agree that the courts should request the views of the Government and, to the fullest extent possible, the executive branch should advise the courts which interests they deem dominant. But we do not think that the executive should be required to advise the courts on substantive matters where it is within the executive's determination that there are sensitive foreign policy issues involved. So we would not favor a requirement that the executive speak in cases such as that.

We respectfully submit that there is a deficiency in S. 397 in that it does not set forth a mechanism for soliciting and receiving the views of the foreign governments. We think there should be a companion provision in the statute that would permit the courts to either request from the Embassy of the involved country, or request through the United States, that the foreign countries be advised of the pendency of the action and that they be asked to provide their views. The statute should require the court to permit the foreign government to appear as a matter of right, amicus curiae, on the balancing question.

With respect to section 5, the detrebling provision, we support that, the section supports that as an effective middle ground, as a compromise to outright dismissal, but an appropriate option and alternative for the court to take where the balancing process reveals a substantial adverse effect on the foreign nation, but yet, the U.S. interests in enforcing the antitrust laws through a private right of action predominate.

We think that this compromise is also a wise response to the contention by foreign governments with regard to what they view as the punitive portion of treble damages being a criminal penalty that should not be applied extraterritorially, and we think that the detrebling concept, in the context of these private cases involving foreign interests, can ameliorate the kinds of conflicts we have discussed.

Senator McConnell. I just want to interrupt you for a second. I am going to have to leave, but I want you to continue. We expect one of the Senators to come, but in any event, you can go ahead and finish up, and I want to thank you both for coming.

Mr. Kingdon. I have just two extra points to speak to.

Our section favors the forum nonconveniens provision at section 4 of the bill, where appropriate. We take no exception to that.

However, we do have a suggestion with respect to section 2 of the bill, where the provision would be to legislate early consideration of all motions to dismiss. The section feels that section 2 of the bill is unnecessary to the purpose of the bill and that it may intrude unnecessarily upon the judges' province to administer an orderly sequence discovery relating to jurisdiction that does not affect any conflict between a foreign country and U.S. domestic interests.

We feel that section 3, that does accelerate the consideration of the balancing test, as well as the acceleration of the detrebling question, sufficiently responds to the concern that jurisdictional matters should be up front in pretrial proceedings, and any other jurisdictional motion relating to subject matter jurisdiction should be within the discretion of the court to determine whether or not that should be accelerated, or whether or not jurisdictional and merits discovery can proceed together. We think that the deletion of section 2 would in no way hinder the laudatory purpose of the bill, and the section supports generally 397 with the slight modifications I have suggested.

Thank you.

Mr. Starling. Thank you very much, Mr. Kingdon.

[Statement follows:]

STATEMENT OF

JOHN S. KINGDON
CHAIRMAN

INTERNATIONAL ASPECTS OF ANTITRUST LAW COMMITTEE

OF THE

SECTION OF INTERNATIONAL LAW AND PRACTICE

AMERICAN BAR ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES SENATE

on the subject of

THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985

(S. 397)

June 21, 1985

These views are being presented only on behalf of the Section of International Law and Practice of the American Bar Association and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

Thank you, Mr. Chairman. I am John S. Kingdon, Chairman of the International Aspects of Antitrust Law Committee, of the Section of International Law and Practice of the American Bar Association. I appreciate this opportunity to present to this Committee the views of the Section of International Law and Practice on S. 397, the Foreign Trade Antitrust Improvements Act of 1985. These views are being presented only on behalf of the Section of International Law and should not be construed as representing the position of the American Bar Association.

I am submitting today for the record a Report on S. 397 that presents the detailed position of the Section of International Law on this issue. (Report attached hereto.) In my oral testimony I will only touch the main points raised by that Report.

Let me begin by saying that the Section of International Section Law enthusiastically supports the basic intent and approach of S. 397, although we believe that certain comparatively minor changes are necessary.

S. 397 succeeds because it is focused narrowly on the question of jurisdiction and does not attempt to legislate a solution to complex problems of transnational discovery, foreign secrecy laws, and the extent to which foreign defendants can be compelled to appear in United States courts. S. 397 is reasonable in scope, as it primarily seeks to codify the "jurisdictional rule of reason" that has been evolving in American courts during the past decade.

This legislation is needed because antitrust and competition laws, in the United States and in other industrial countries, seek to impose national economic policies on an international economy. During most of the 40-year period since Judge Learned Hand's decision in the Alcoa case, American courts have applied our antitrust laws to conduct by foreign subjects in foreign countries that had anticompetitive effects in the United States. That trend continues in the 1980s with the Laker case, but we have now come to realize that extraterritorial antitrust law is at least a two-way street.

I do not mean to suggest, as some European practitioners and scholars have done, that American antitrust enforcement should stop at the water's edge. On the contrary, the protective principle, which is well established in international law, gives each sovereign government the right to protect its citizens from economic or physical harm, regardless of where that harm originates. However, in protecting ourselves from anticompetitive effects, we must be careful not to inflict unnecessary harm on others. This bill recognizes that there are some antitrust cases where, even though there is an effect on competition in the United States, the interests of the foreign government in regulating the defendant's alleged conduct are so predominant, that for legitimate policy reasons a private antitrust action arising out of those facts should not be heard by United States courts. S. 397 would provide a statutory mechanism for the early consideration of dismissal of such cases.

S. 397 would make sure that jurisdictional questions are decided early, and that the United States Government is given a full opportunity to express its views on governmental interests. At least a few cases would be dismissed at this early stage. Even more importantly, this legislation gives the court discretion to compromise with a judicial resolution short of outright dismissal. In cases where the United States' interests are substantial enough to support jurisdiction, but a foreign government's interests nevertheless would be adversely affected by the case, the court has the option to grant only actual damages. This responds to the objection raised by several foreign governments in the past that the punitive component of treble damages in a private antitrust action is a quasi-criminal remedy that should not be applied outside the borders of the United States.

Against that general background, I will discuss briefly each of the main provisions of S. 397.

Dismissal for Conflict With Preponderant Foreign Government Interests

Section 3

The most important provision of S. 397 is contained at Section 3 that would require United States courts to dismiss antitrust actions whenever the court "determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action."[1] This provision "is intended to codify, and improve the operation of, the 'jurisdictional rule of reason' in private antitrust actions involving commerce with foreign nations."[2]

The Section of International Law and Practice believes this provision is a necessary, desirable first step toward achieving consistent and fair adjudiciation of private antitrust cases that affect foreign national interests. Although the bill does not specifically list the factors to be weighed by courts in ruling on motions to dismiss based on conflicts with the interests of foreign nations, it would require all courts to give due consideration to foreign national interests that might be affected by extraterritorial enforcement of United States antitrust laws. It seems prudent to permit the courts to fashion the relevant factors on a case-by-case basis. It seems likely that courts, in complying with this statutory balancing requirement, would further refine and develop the principles already outlined in Timberlane and its progeny, without the need for Congress to specify what particular criteria should be considered in balancing national interests.

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[1] S. 397, § 3.

[2] Introductory statement of Senator DeConcini, 131 Cong. Rec. S1162 (daily ed., Feb. 6, 1985).

Soliciting U.S.Government Views on Possibly Competing National Interests

S. 397 would expressly permit United States courts to request the views of the United States Government "as to the effects of the [antitrust] action on the interests of the United States and on any affected foreign nation," and would require the United States Government to respond to all such requests.[3]

The Section of International Law and Practice agrees that courts should request the views of the United States Government as to the United States and foreign interests affected by a private antitrust action.

To the fullest extent possible, the Executive Branch should advise the court which national interest is, in its view, dominant. The Executive Branch should not be required to advise the court with respect to sensitive foreign policy issues, if providing the court with such advice would adversely affect any aspect of United States foreign relations.

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[3] S. 397, § 3.

Mechanism for Soliciting Views of Foreign Government

As presently drafted, S. 397 provides for the court to consult with the United States Government, but does not address the vexing problems inherent in obtaining the views of foreign governments on transnational private antitrust litigation.

The Section of International Law and Practice recommends that, in addition to providing for courts to consult with the United States Government, S. 397 should also provide for the court to contact the embassy of the affected foreign government, or request the United States Government to seek the views of the government of each foreign country whose interests are alleged to be harmed by the action. The statute should require the court to permit any foreign government to appear, as a matter of right, as *amicus curiae*, for the purpose of presenting its position on the threshold "jurisdictional rule of reason" issue, and also should require the court to incorporate in the record any diplomatic note submitted through this process.

Evidentiary Weight to Government's Comments

Comments by the governments of the United States and affected foreign countries should carry considerable weight in the court's balancing of national interests affected by a private antitrust action. However, there may be important policy reasons why the United States Government may decline to express an opinion in any particular case.

The legislative history should make it clear that no inference whatever should be drawn from the failure of the United States Government to express substantive views in a particular case. The legislative history also should note, however, that a foreign government's failure to appear or give any formal indication, after receiving notice, that it believes its interests to be adversely affected by a particular case should carry some evidentiary weight. Since the essential purpose of S. 397 is to prevent private actions under United States antitrust laws from interfering with the sovereign interests of foreign governments, it would be illogical to ignore acquiescence by a foreign government whose interests are alleged to be affected.

S. 397 should not be used to enable private litigants to obtain the dismissal of antitrust actions on foreign policy grounds when neither the United States Government nor the foreign government has identified any foreign policy conflict raised by the litigation.

Early Consideration of Motion to Dismiss for Interference With Foreign National Interests

Section 3 of S. 397 would require that any motion to dismiss based on interference with foreign national interests must be heard and determined "before conducting or permitting the parties to conduct any further proceedings in the action."

This would require the court to determine the balance of conflicting national interests before permitting any discovery or other burdensome pretrial proceedings on the merits. The Section of International Law and Practice strongly supports this provision, which would, to some extent, protect foreign sovereigns from intrusive discovery and related proceedings in private antitrust actions where the court ultimately dismisses the action on comity grounds.

Limitation to Actual Damage Recovery

When an action would have a substantial adverse effect on the interests of a foreign nation, yet United States interests in the action predominate, S. 397 would give the court discretion to limit a private antitrust plaintiff's recovery to actual damages plus attorneys' fees and costs. Damages could be limited if the court found that such a limitation would substantially reduce the adverse effect of the case on the interests of a foreign nation. The Attorney General would be required "to set forth the views of the United States as to the effects of the claim and of the possible limitation of damages . . ." on the interests of foreign nations, upon a request by the court. Any motion to limit damages would be decided under the same "expedited" procedures provided for a motion to dismiss on grounds of international comity.

The Section of International Law and Practice endorses this provision of the bill, which provides an important middle ground for courts that have weighed competing national interests and cannot conclude either that the case should be dismissed because the interests of the United States are outweighed by foreign interests, or that adversely-affected foreign interests are so insignificant that no extraterritoriality problem exists. This compromise option is a wise response to the contention of foreign governments that the punitive portion of treble damages is a criminal penalty that should not be applied extraterritorially. In cases where the foreign government can show that it has a strong interest in encouraging or protecting the allegedly-anticompetitive conduct of the defendants, it would be appropriate for the American court to decide that the American plaintiff has a right to compensation for its actual damages, but that the foreign defendants who had acted consistently with the expressed economic policies of their home government should not be subject to treble damages.

The Section of International Law and Practice endorses the general principle of consultation with the Government on detrebling, but recommends that the foreign government also should have the right to participate, if it so chooses. The Section also endorses the provision for early consideration of motions to detreble damages.

Forum Non Conveniens

Section 4 of S. 397 specifically provides that "the doctrine of forum non conveniens shall be applicable in any suit, action or proceeding under the antitrust laws that involves trade or commerce with a foreign nation. . . ." This provision would permit the court to decline jurisdiction in favor of an alternative forum, including a foreign court, where adjudication of the claim would better serve judicial efficiency, convenience of the parties, or the interests of justice. As Senator DeConcini correctly observed, antitrust suits currently are the only federal regulatory action to which the doctrine of forum non conveniens does not apply.[*]

The Section of International Law and Practice also supports this provision. However, since most foreign countries do not provide private rights of action on antitrust claims, only rarely will a United States court be able to determine that a foreign forum is truly available to hear a private civil damages action. American courts could refuse jurisdiction only when the foreign country's laws recognized a private right of action for damages on generally similar legal theories to those raised in the American complaint, and then only if courts in that foreign jurisdiction actually were available to American plaintiffs on a nondiscriminatory basis.

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[*] 131 Cong. Rec. S1163 (daily ed., Feb. 6, 1985).

Early Consideration of All Motions to Dismiss for Lack of Subject Matter Jurisdiction

Section 2

Unlike the other sections of S. 397, which require the courts to evaluate and balance the interests of foreign countries in antitrust litigation, Section 2 of the bill would provide, in Sherman Act cases only, expedited consideration of motions to dismiss for lack of subject matter jurisdiction, regardless of foreign national interests. S. 397, through Section 2, would provide that motions to dismiss for lack of a "direct, substantial, and reasonably foreseeable" anticompetitive effect on United States commerce would receive the same expedited consideration provided for motions to dismiss or to detreble damages based on interference with foreign national interests.

The Section of International Law and Practice believes that Section 2 of S. 397 is unnecessary to the purpose of the bill and intrudes unnecessarily upon the province of the court to administer the orderly sequencing of normal pretrial procedures in civil litigation. The bill already provides for expedited consideration of motions to dismiss due to conflicts with foreign government interests and of motions to limit recovery to actual damages. In cases where foreign interests are neither predominant nor substantially at risk, there does not appear to be any additional reason to provide special treatment for motions to dismiss on jurisdictional grounds.

There are substantial reasons not to treat all jurisdictional motions to dismiss differently in antitrust cases that involve foreign commerce. United States courts faced with antitrust and other complex litigation have not hesitated, in appropriate cases, to dismiss promptly for lack of jurisdiction. There is no reason to treat all jurisdictional issues differently simply because part of the conduct at issue took place outside the United States.

Conclusion

Accordingly, the Section of International Law and Practice respectfully endorses the general purpose of S. 397, suggests slight modifications to establish a procedure whereby the interests of foreign countries can be presented to the court, and recommends that Section 2 of the bill be deleted as unnecessary to the principal, laudatory purpose of the bill.

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SECTION OF INTERNATIONAL LAW AND PRACTICE

REPORT ON THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985 (S. 397)

June 21, 1985

These views are being presented only on behalf of the Section of International Law and Practice of the American Bar Association and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

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REPORT ON THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985 (S. 397)[1]

The Foreign Trade Antitrust Improvements Act of 1985 (S. 397) is designed to remedy difficulties connected with United States private antitrust treble damage actions that are perceived to conflict with the national interests of our trading partners. The legislation would (1) codify the "jurisdictional rule of reason" providing for the dismissal of private antitrust actions where the United States interest in antitrust enforcement is outweighed by countervailing foreign interests; (2) grant United States courts discretion to limit a private antitrust plaintiff's remedy to actual damages when such a limitation would reduce the adverse effects of a treble damages award on foreign national interests; (3) provide for expedited resolution of all jurisdictional issues at the outset of the litigation, prior to discovery on the merits; and (4) specifically provide that the doctrine of forum non conveniens applies in private antitrust litigation where a foreign court may provide a more appropriate forum than a United States court.

A Task Force of the International Aspects of Antitrust Law Committee recommends that the Section of International Law and Practice should support S. 397, with suggested minor modifications described herein. S. 397 is a systematic and well-reasoned proposal that would substantially reduce conflicts between United States antitrust policy and foreign national interests, without sacrificing the interests of the United States in preserving open and competitive markets.

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[1] This Report is the product of a Task Force appointed by the International Aspects of Antitrust Law Committee of the Section of International Law and Practice to review and evaluate S.397. The Task Force was composed of John H. Calhoun, James S. Campbell, Mark R. Joelson, John C. Peirce and Chairman John S. Kingdon.

Need for Legislation

The primary purpose of S. 397 is to codify and implement the jurisdictional reach of federal and state antitrust laws as to conduct outside the borders of the United States. In order to understand the significance of the legislative proposal, it is necessary to understand the preexisting bases of United States antitrust jurisdiction. Congress enacted the federal antitrust laws pursuant to the Commerce Clause of the Constitution, which empowers Congress "[t]o regulate commerce with foreign Nations, and among the several States."[2] Courts have construed federal antitrust laws broadly, extending them both to direct restraints on export or import commerce[3] and to conduct abroad, outside the flow of exports and imports, which has anticompetitive effects on United States foreign or interstate commerce. The seminal decision in this area is United States v. Aluminum Co. of

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[2] U.S. Const. art. I, § 8, cl. 3.

[3] See Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944); Rahl, Foreign Commerce Jurisdiction of the American Antitrust Laws, 43 Antitrust L.J. 521, 523 (1974).

America[4] ("Alcoa"), which held that the Sherman Act applied to a United States company's independent Canadian subsidiary that had joined an international aluminum cartel. In Alcoa, Judge Learned Hand observed that it was settled law that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[5] Accordingly, the antitrust laws have been applied to agreements and concerted conduct, even among foreigners in foreign countries, if such conduct was "intended to affect . . . and did affect" the interstate or foreign commerce of the United States.[6]

Judge Hand's intended effects test, often referred to as the "effects doctrine," has been widely criticized for more than 30 years. Foreign critics of the doctrine have complained that for the United States to impose its antitrust philosophy on foreign businesses in foreign countries is a clear violation of international law.[7] Recently, hostility towards the extraterritorial enforcement of U.S. laws has prompted at least several countries, including Great Britain, France, Australia, and Canada, to pass defensive laws designed to defeat the enforcement of U.S. antitrust and other economic regulatory laws against their citizens.[8]

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[4] 148 F.2d 416-442 (2d Cir. 1945).

[5] 148 F.2d at 443-44.

[6] Id.

[7] See, e.g., Submission to the House of Lords by the British Attorney General in In re Westinghouse Electric Corp. Uranium Contracts Litigation, [1978] A.C. 547: "The assertion of extraterritorial jurisdiction in anti-trust matters represents an extension of the economic policy of one state which is likely to conflict with that of other states . . . ."

Largely in response to intense foreign criticism of the extraterritorial application of U. S. antitrust laws, scholars, federal agencies, Congress and the courts, over a 30-year period, have tempered the effects doctrine. In 1958, Kingman Brewster urged courts to adopt what he called a "jurisdictional rule of reason" in foreign antitrust cases.[9] In 1965, the Restatement (Second) Foreign Relations Law of the United States acknowledged that antitrust jurisdiction might be based on the domestic effects of foreign conduct but only if the domestic effect was "substantial" and was a "direct and foreseeable" result of the challenged foreign activity.[10] The Department of Justice formally endorsed the "substantial, direct and foreseeable" effects standard and the "jurisdictional rule of reason" in its 1977 Antitrust Guide for International Operations.[11] And in 1982, Congress enacted Title IV of the Export Trading Company Act of 1982,[12] which limits the application of the Sherman and FTC Acts in cases involving export trade or wholly foreign activities (but not U.S. import commerce) to instances when the anticompetitive effect on U.S. interstate or foreign commerce is "direct, substantial, and reasonably foreseeable."

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[8] See Protection of Trading Interests Act 1980 (U.K.); Law No. 80-538 [1980], J.O. 1799 (France); Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979, No. 13, Austl. Acts (Australia); Uranium Information Security Regulations, Can. Stat. O. & Reg. 76-644 (P.S. 1976-2368, Sept. 21, 1976) (Canada). See also Restatement (Revised) Foreign Relations Law of the United States, Tent. Draft No. 6 (March 1985) § 403, and Reporter's Notes thereto.

[9] K. Brewster, Antitrust and American Business Abroad 446 (1958). Cf. J. Atwood and K. Brewster, Antitrust and American Business Abroad Ch. 6 (1981); accord, 1 P. Areeda and D. Turner, Antitrust Law ¶ 239 (1978).

[10] American Law Institute, Restatement (Second) Foreign Relations Law of the United States § 18; Comments f, g; Reporter's Note 2 (1965).

In recent years, federal courts have begun to enunciate a "jurisdictional rule of reason" based on international comity. The leading case creating such a standard is Timberlane Lumber Co. v. Bank of America,[13] in which the Ninth Circuit held that a United States court should balance a number of factors, including the competing interests of the United States and any affected foreign country in determining whether to assert antitrust jurisdiction. Although the Timberlane balancing approach has been accepted, in some form, in subsequent decisions,[14] the "jurisdictional rule of reason" has not been uniformly applied or even universally accepted by United States courts. Indeed, the recent decision in Laker Airways, Ltd. v. Sabena[15] specifically rejected the notion that United States courts should balance competing national interests or evaluate the foreign policy implications of asserting extraterritorial antitrust jurisdiction, at least when the Executive Branch has not provided a clear statement of the foreign policy interests involved. Thus, although most courts agree that antitrust jurisdiction reaches only anticompetitive conduct with more than a *de minimis* effect on U.S. Commerce,[16] there is no consistent set of rules or procedures by which the interests of foreign nations can be considered by United States courts in private antitrust litigation.

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[11] United States Department of Justice, Antitrust Division, Antitrust Guide for International Operations (1977).

[12] Pub. L. No. 97-290, 96 Stat. 1233 (1982), Tit. IV, codified in 15 U.S.C. § 6a.

[13] 549 F.2d 597 (9th Cir. 1976), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984).

[14] E.g., Industrial Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244, aff'd on remand, on other grounds, 704 F.2d 785 (5th Cir. 1983); National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6 (2d Cir. 1981); Montreal Trading, Ltd. v. Amax, Inc.,

S. 397 is primarily a procedural bill, which would formally require U.S. courts and the Executive Branch, in antitrust cases that may harm foreign national interests, to evaluate the interests of foreign nations that might be affected, and to balance such foreign interests against the United States

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[Footnote continued]

661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980).

[15] 731 F.2d 909, 948 (D.C. Cir. 1984).

[16] *See* cases cited in footnote 15, *supra*, and in *Laker*, 731 F.2d at 951, nn.156, 158.

interest in a fair and consistent enforcement of its state and federal antitrust laws to regulate conduct that may have anticompetitive effects on United States commerce. In addition to its general requirement that such issues be considered, the bill contains several mechanisms to ensure that international comity issues are considered promptly, at an early stage in the litigation, to ensure that non-meritorious cases are dismissed before doing serious damage to United States foreign relations.

Detailed Analysis of Legislation

1. Codification of the Jurisdictional Rule of Reason

The most important provision of S. 397 would require United States courts, in private antitrust actions brought under federal or state laws, to dismiss the action whenever the court "determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action."[17] This provision "is intended to codify, and improve the operation of, the 'jurisdictional rule of reason' in private antitrust actions involving commerce with foreign nations."[18]

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[17] S. 397, § 3. The provision would be contained in a new § 21(a) of the Clayton Act.

[18] Introductory statement of Senator DeConcini, 131 Cong. Rec. S1162 (Daily Ed. Feb. 6, 1985).

The Task Force endorses S. 397's codification of the "jurisdictional rule of reason," which is a necessary and desirable first step toward achieving consistent and fair adjudication of private antitrust cases that affect foreign national interests. Although the bill does not specifically list the factors to be weighed by courts in ruling on motions to dismiss based on conflict with the interests of one or more nations, the proposed legislation would require all courts to give due consideration to foreign natonal interests that might be affected by extraterritorial enforcement of United States antitrust laws. It seems likely that courts, in complying with S.397's balancing requirement, would further refine and develop the principle already outlined in Timberlane and its progeny, without the need for Congress to specify what particular criteria should be considered in balancing national interests.

2. Soliciting the View of the United States Government and Affected Foreign Governments

In order to implement the "jurisdictional rule of reason," there must be a mechanism whereby courts can ascertain what national interests need to be balanced. S. 397 would expressly permit United States courts to request the views of the United States Government "as to the effects of the [antitrust] action on the interests of the United States and on any affected foreign nation," and would require the United States Government to respond to all such requests.[19]

The Task Force agrees with the general purpose of S. 397 that courts should request the views of the United States Government as to the United States and foreign interests affected by an antitrust action.

In addition, the Task Force recommends that the text of the statute or the legislative history should state Congress' intent that, to the fullest extent possible, the Executive Branch should advise the court which national interest is, in its view, dominant. The legislative history also should indicate that the Executive Branch is not required to advise the court with respect to sensitive foreign policy issues if providing the court with such advice would adversely affect any aspect of United States foreign relations. In such cases, it would be appropriate for the Executive Branch to advise the court that the United States Government was unwilling to take a public position as to the competing national interests raised by the particular litigation.

As presently drafted, S. 397 provides for the court to consult with the United States Government, but does not address the more vexing problems inherent in obtaining the views of foreign governments on transnational antitrust litigation. Prior to 1978, the United States Department of State encouraged foreign governments interested in United States domestic litigation to submit diplomatic notes, which would be referred to the appropriate court. This procedure was unsatisfactory for a number of reasons, most significantly that diplomatic notes generally do not provide the type of evidentiary proof and legal argument necessary for an informed analysis by the court. In 1978, the Clerk of the United States Supreme Court notified the Solicitor General that a foreign government that desired to present its views to the federal courts on a pending case should do so as *amicus curiae*. Although this procedure has enabled foreign governments willing to retain American counsel to participate as advocates in litigation, the procedure has not been well understood, nor has it always been welcomed by United States courts. Foreign governments are, quite understandably, reluctant to ask permission of a United States judge or of the parties for leave to file a brief. There also have been unpleasant episodes in which United States courts have publicly criticized positions taken by foreign governments as *amici curiae*.[28]

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[19] S. 397, § 3.

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[28] One well-documented instance occurred in *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), in which the court severely criticized foreign governments for appearing as *amici curiae*. In that case, the Department of Justice formally, albeit indirectly, criticized the appeals court's harsh treatment of the foreign government *amici*. *See* letter from John H. Shenefield, Associate Attorney General, to the Hon. Prentice H. Marshall, United States District Judge (May 6, 1980) (formal statement of interest by the United States in the Uranium litigation), *reprinted in* [1969-1983 Current Comment Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,416.

The Task Force recommends that S. 397, in addition to providing for courts in proper cases to consult with the United States Government, also should provide for the court to contact the embassy of the affected foreign government, or request the United States Government to seek the views of the government of each foreign country whose interests are alleged to be harmed by the action. Such foreign governments should be invited to respond, at their own discretion, either through diplomatic notes, which would be transmitted to the court by the United States Government, or by participating as *amici curiae*. The statute should require the court to permit any foreign government to appear, as a matter of right, as *amicus curiae* for the purpose of presenting its position on the threshold "jurisdictional rule of reason" issue and also should require the court to incorporate in the record any diplomatic note submitted through this process.

Comments by the governments of the United States and affected foreign countries should carry considerable weight in the court's balancing of national interests affected by an antitrust action. However, as already noted, there may be important policy reasons why the United States Government may, in any particular case, decline to express an opinion. The legislative history should make it clear that no inference whatever should be drawn from the failure of the United States Government to express substantive views in a particular case. The legislative history also should note, however, that a foreign government's failure to appear or give any formal indication, after receiving notice, that it believes its interests to be adversely affected by a particular case should carry some evidentiary weight. Since the essential purpose of S. 397 is to prevent United States antitrust laws from interfering with the sovereign interests of foreign governments, it would be illogical to ignore acquiescence by a foreign government whose interests are alleged to be affected. S. 397 should not be read to permit private litigants to obtain the dismissal of antitrust actions on foreign policy grounds when neither the United States Government nor the foreign government has identified any foreign policy conflict raised by the litigation.

3. Early Consideration of Motion to Dismiss for Interference With Foreign National Interests

In addition to requiring courts to balance competing United States and foreign national interests, Section 3 of S. 397 would require that any motion to dismiss based on interference with foreign national interests must be heard and determined "before conducting or permitting the parties to conduct any further proceedings in the action." This would require the court to determine the balance of competing national interests before permitting any discovery or other burdensome pre-trial proceedings on the merits. This provision, which the Task Force endorses, would, to some extent, protect foreign sovereigns from offensive and intrusive discovery and related proceedings in private antitrust actions where the court ultimately dismisses the action on comity grounds.

4. Limitation to Actual Damage Recovery in Certain Cases

When an action would have a substantial adverse effect on the interests of a foreign nation, yet United States interests in the action predominate, S. 397 would give the court discretion to limit a private antitrust plaintiff's recovery to actual damages plus costs and attorneys fees. Damages could be limited upon a judicial determination that such a limitation would substantially reduce the adverse effect of the case on the interests of a foreign nation. The Attorney General would be required "to set forth the views of the United States as to the effects of the claim and of the possible limitation of damages . . ." on the interests of foreign nations, upon a request by the court. Any motion to limit damages would be decided under the same "expedited" procedures provided for a threshold motion to dismiss on grounds of international comity as discussed in part 3, supra.

The Task Force endorses this provision of the bill, which provides an important middle ground for courts that have weighed competing national interests and cannot conclude either that the case should be dismissed because the interests of the United States are outweighed by foreign interests, or that adversely-affected foreign interests are so insignificant that no extraterritoriality problem exists. In a significant number of cases, even though United States interests are predominant, substantial foreign interests may be adversely affected. This issue is crucial in cases where the allegedly anticompetitive conduct was encouraged by the policies of a foreign government. In such cases, the imposition of punitive treble damages in effect penalizes companies for complying with foreign government policies, whereas the imposition of actual damages for provable injury has no such political dimension.

The "foreign sovereign compulsion" defense is, of course, available to defendants who can show that their actions were required by a foreign government. No such defense is available, in antitrust, tort, contract or any other type of litigation, to defendants whose actions were encouraged but not required by a foreign government. Although S.397 contains no such provision, it is worth considering whether motions to dismiss on the grounds of foreign sovereign compulsion, act of state, or foreign sovereign immunity, should be handled on the same expedited basis as motions to dismiss for interference with foreign government interests.

S. 397 provides for the court to consult with the United States Government in connection with detrebling motions. The Task Force endorses the general principle of consultation with the government on such issues but recommends that consultation procedures should be modified in the same manner and for the same reasons stated in section 2 of this Report, supra at 4-8. In many cases it seems likely that a motion to dismiss for conflict with foreign national interests would be filed concurrently with an alternative motion to detreble damages, so that a single consultation could take place with United States and foreign governments on all issues relevant to both motions.

The Task Force also endorses the provision for early consideration of motions to detreble damages.

5. Forum Non Conveniens

Section 4 of S. 397 specifically provides that "the doctrine of forum non conveniens shall be applicable in any suit, action or proceeding under the antitrust laws that involves trade or commerce with a foreign nation. . . ." This provision would permit the court to decline jurisdiction in favor of an alternative forum, including a foreign court, where adjudication of the claim would better serve judicial efficiency, convenience of the parties, or the interests of justice. As Senator DeConcini correctly observed, antitrust suits currently are the only federal regulatory action to which the doctrine of forum non conveniens does not apply.[11]

The Task Force recommends support for this provision, although it would appear to be primarily of academic interest.

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[11] 131 Cong. Rec. S 1163 (Daily Ed., Feb. 6, 1985).

The legislative history should indicate that, since most foreign countries do not provide private rights of action on antitrust claims, only rarely will a United States court be able to determine that a foreign forum is truly available. American courts could refuse jurisdiction only when the foreign country's laws recognized a private right of action for damages on generally similar legal theories to those raised in the American complaint, and then only if courts in that foreign jurisdiction actually were available to American plaintiffs on a nondiscriminatory basis.

6. Early Consideration of Motion to Dismiss for Lack of Subject Matter Jurisdiction

Unlike the other sections of S. 397, which require the courts to evaluate and balance the interests of foreign countries in antitrust litigation, Section 2 of the bill would provide expedited consideration of motions to dismiss for lack of subject matter jurisdiction, regardless of foreign national interests.[22] Section 2 would add a subsection to the current Section 7 of the Sherman Act, 15 U.S.C. § 6(a), which was enacted as Title IV of the Export Trading Company Act of 1982. As currently in force, Section 7 provides that the Sherman Act does not apply to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," unless such conduct has a "direct, substantial, and reasonably foreseeable" anticompetitive effect on U.S. interstate commerce, import commerce, or the export trade or export commerce of a United States person. S. 397 would provide that motions to dismiss for lack of such a "direct, substantial, and reasonably foreseeable effect" would receive the same expedited consideration provided for motions to dismiss or to detreble damages based on interference with foreign national interests.

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[22] Also unlike the rest of S. 397, Section 2 would apply only in Sherman Act and FTC Act cases, and not in actions filed in state courts or under state law.

The Task Force believes that Section 2 of S. 397 is unnecessary and intrudes upon the province of the court to administer the orderly sequencing of normal pretrial procedures in civil litigation. The bill already provides for expedited consideration of motions to dismiss due to conflicts with foreign government interests. In cases where foreign interests are significant, but not predominant, there also would be expedited consideration of motions to limit recovery to actual damages. In cases where foreign interests are neither predominant nor substantially at risk, there does not appear to be any additional reason to provide special treatment for motions to dismiss on jurisdictional grounds.

Indeed, there are substantial reasons not to treat jurisdictional motions to dismiss differently in antitrust cases that involve foreign commerce. It is fundamentally unfair to subject any defendant, regardless of nationality, to burdensome and protracted discovery and pre-trial proceedings in a case in which the court could have determined, at an early stage of the litigation, that dismissal was appropriate for lack of jurisdiction. United States courts faced with antitrust and other complex litigation have not hesitated in appropriate cases to dismiss promptly for lack of jurisdiction. There is no reason to treat this type of jurisdictional issue differently simply because part of the conduct at issue took place outside the United States.[23]

Conclusion

The Task Force accordingly recommends that the Section of International Law and Practice endorse the general purpose of S. 397, and further recommends that Section 2 of the bill should be deleted and other changes and additions to the legislative history made as stated herein.

John S. Kingdon,
  Chairman
John H. Calhoun
James S. Campbell
Mark R. Joelson
John C. Peirce

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[23] Moreover, since the current Section 7 of the Sherman Act does not apply to conduct involving import trade or import commerce, Section 2 of S. 397 would be similarly limited. This would lead to the anomalous result that motions to dismiss for lack of jurisdiction in cases involving only exports or wholly foreign transactions would be considered under different rules than motions to dismiss in cases involving import commerce. The Task Force does not believe that this was the result intended by Senator DeConcini. However, since the Task Force recommends that Section 2 of S. 397 be deleted, this drafting inconsistency need not be corrected.

Mr. STARLING. Mr. Shenefield, could you summarize the report of the antitrust section?

Mr. SHENEFIELD. Mr. Chairman, I would be delighted to do so. I am pleased to appear before this committee on behalf of the section of antitrust law of the American Bar Association.

I appear for the purposes of supporting with enthusiasm S. 397, the proposed Foreign Trade Antitrust Improvements Act of 1985.

I should add the pro forma statement that the views that I express are presented on behalf and only on behalf of the antitrust section, that the views have not been approved by the house of delegates or the board of governors, and they are therefore not the views of the American Bar Association—yet.

The section supports this bill as an important and well-crafted effort to deal with a persistent problem of giving unnecessary offense to the governments of foreign states. At the same time, the provisions of the bill seem to us clearly to recognize and to preserve the important interests of the United States in vigorous enforcement of the antitrust laws against restraints of trade that have their origin abroad.

In recent years, it has become very apparent indeed that the assertion of U.S. antitrust jurisdiction in certain cases involving foreign commerce has engendered serious international tension. Governments have criticized, and in some cases through the enactment of statutes, retaliated against, the extraterritorial features of U.S. antitrust law.

It is important to note that antitrust prosecutions by the U.S. Government, although they too have been subject to criticism, are not properly in the same class with private actions as an appropriate subject for legislative attention, for two reasons. First, foreign governments have ample opportunity to make their views known to the U.S. Government in advance of a prosecution, through an intricate system of notification and consultation, by means both of diplomatic notes and personal meetings.

Second, the U.S. Government as a part of its decisionmaking process—that is, as a part of prosecutorial discretion—itself analyzes the relative interests of the U.S. Government and any affected foreign government, and the process makes a difference. I am sorry Senator Metzenbaum has departed, because he would remember with me one obvious public example of that weighing process, the *Uranium* case, in which in sharp contrast to the private case, the Department of Justice declined to bring suits against foreign companies after applying the standards of the sort called for in S. 397.

The courts have struggled as best they could to evolve effective principles and procedures of dealing with this conflict among friendly governments. Thus far, it is fair to say that the record is mixed; the judicial solutions are ad hoc in nature, and in some notable cases, have been ineffective to avoid disputes.

That is the context in which this piece of legislation seeks to offer a framework—and it can do no more than that—a framework within which the United States and foreign national interests can be taken into account.

The centerpiece of the legislation, that is, the balancing procedure according to which relative interests of friendly governments and the U.S. Government are weighed, seems to us to be essential.

The bill would codify the developing reasonableness standard. We favor this provision very strongly.

A second major aspect of the bill, which the section also supports, is that providing a procedural mechanism for resolving that issue, that is to say, the issue of the balancing of relative interests, early in the litigation, prior to discovery on the merits and prior to other burdensome pretrial proceedings. And we also support that major provision.

We support a third major provision of the bill which would limit an antitrust plaintiff to actual damages in cases in which foreign national interests would be unfairly and adversely affected by a treble damage award.

While we do support the bill with enthusiasm, we would be so bold as to suggest several minor modifications for the record.

First, we believe, along with the bill's drafters, that the experience of the executive branch is indeed an important aid to courts seeking to evaluate the relative interests of foreign and the U.S. Government. But we suggest two changes. First, section 3 should be changed to require, not to permit, the courts to request the views of the U.S. Government. And second, the U.S. Government should not itself be required to advise the court with respect to any issues it deems too sensitive to avoid adversely affecting U.S. Government interests or policies. So we would suggest minor modifications in section 3.

Second, motions to dismiss based on act of State or foreign sovereign compulsion grounds, it seems to us, should also be included within section 3. The same logic applies and the same benefits are achievable.

Third, we do not favor the mandatory early consideration of motions to dismiss for lack of subject matter jurisdiction other than those in section 3 and the two that I have just mentioned. In those cases not included within the bill as we would like to see it drafted, early resolution may indeed be appropriate, and if it is, a court, a judge can order early resolution. Where it is not—and there are some such cases—mandatory early resolution will cause unnecessary confusion and do unnecessary damage to the private treble damage action.

In concluding, Mr. Chairman, let me say a few brief words about the testimony of some of our earlier witnesses. As I understand the position taken by the administration against the bill, it resolves into two basic points. First, detrebling is at this stage ill-advised because a study is to be completed which will inform us more broadly on the subject of treble damages. I think it would be well, where we can take small steps that are by all accounts a matter of consensus, to do so rather than waiting until a more elaborate and more ambitious scheme achieves the same results—and it does appear to the antitrust section, at least, that there is a broad consensus on this important small step in the detrebling area.

Second, as mentioned by our predecessors here in the witnesses chair from Wilmer, Cutler & Pickering, we at least do not read the bill to apply unequally to foreign corporations. We believe, and the legislative history should demonstrate it if it is in doubt, that the detrebling provisions would apply equally to U.S. corporations, thus leaving U.S. corporations at no disadvantage.

The second major point is that courts are inappropriate instruments for the balancing of sensitive political interests, and that the bill leaves too broad an outline and not enough concreteness for courts adequately to do the job.

As an aside, for an institution that lives and dies by the language of the Sherman Act, as the Antitrust Division surely does, a monument of generality and lack of specificity, it seems to me strange to criticize this bill for that same defect.

Standards are available in the cases. I am sure the Antitrust Division in its own prosecutorial discretion exercise knows what the standards are. If there is any doubt, the antitrust section would be willing to work cooperatively with others in developing standards for the legislative history so that judges would be better informed as they proceed.

Second, the notion that the interests to be weighed here lead inevitably to a political calculus seems to us unfortunate. Courts are in the business of dealing in justice and making uniform decisions across a wide variety of fact situations. The result of this bill implemented by the courts would seem to us, at least, more surely to represent justice and uniformity than the ad hoc decision of a particular administration in a particular foreign policy context.

Therefore, I would suggest that the interests expressed earlier in the morning, so far from being criticism of the bill, are actually a strong argument in favor of it.

In short, Mr. Chairman, we believe in S. 397 and its general approach. We offer to work with the committee and its staff in any modification that seems well advised. We think the interests of the United States and the enforcement of the antitrust laws will be well served by passage of this bill by Congress on a speedy basis.

Thank you very much.

Mr. STARLING. Thank you very much, Mr. Shenefield.

[Statement follows:]

AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW

REPORT ON S. 397, THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985

May 24, 1985

INTRODUCTION[1]

In recent years, it has become increasingly apparent that the assertion of U.S. antitrust jurisdiction over conduct abroad has engendered serious international tensions between the United States and its trading partners. Numerous foreign governments have criticized and, in some cases, retaliated against, the extraterritorial features of U.S. antitrust law, particularly as they relate to private treble damage actions. Moreover, many United States and foreign corporations have often found themselves in the untenable position of having to navigate between the conflicting competition laws and policies of the United States and other countries.

While the courts have struggled to evolve effective principles and procedures to achieve a more equitable balance between United States and foreign national interests in private antitrust cases, the judicial solutions developed have been ad hoc in nature and not universally accepted. Accordingly, they have at best been only partially effective in addressing the problem. Similarly, the Executive Branch has not been able to resolve the problem through either bilateral or multilateral negotiations and many foreign nations remain extremely troubled over the expansive reach of private treble damage actions in the United States.

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[1] The Task Force preparing this report was appointed by the International Trade Committee of the Section of Antitrust Law, the American Bar Association. The Co-chairmen of the Task Force were A. Paul Victor (New York, N.Y.), John H. Shenefield (Washington, D.C.), David G. Gill (New York, N.Y.) and Jeffrey L. Kessler (New York, N.Y.). Special thanks for assistance in the preparation of this report is also due to Jeffrey P. Bialos (Washington, D.C.).

In this context, S. 397, the "Foreign Trade Antitrust Improvements Act of 1985," is a welcome proposal to create a legislative solution by requiring that both United States _and_ foreign national interests be taken into account in adjudicating private treble damage actions. Its objective is to ease the international tensions and uncertainty resulting from the extraterritorial application of the U.S. antitrust laws without sacrificing the legitimate interests of the United States in protecting its commerce from unreasonable restraints of trade.

The centerpiece of the legislation is a provision which would require U.S. courts to dismiss a private treble damage action if they determine that the interests of the U.S. in permitting the action to go forward are outweighed by the interests of one or more foreign nations adversely affected by the action. S. 397, § 3. Thus, the bill would codify the developing "reasonableness" limitation on U.S. antitrust jurisdiction which compels the dismissal of any private antitrust action in which a balancing of U.S. and foreign national interests indicates that the application of U.S. antitrust laws is inappropriate.

A second major aspect of the bill would provide a procedural mechanism for: (1) determining motions to dismiss based on foreign national interests prior to discovery on the merits and other burdensome pre-trial proceedings (S. 397, § 3); and (2) determining motions to dismiss based on lack of subject matter jurisdiction on the same accelerated basis. (S. 397, § 3).

A third major provision of the bill would limit an antitrust plaintiff to actual damages in cases in which foreign national interests would be unfairly and adversely affected by a treble damage award. S. 397, § 5. Under this provision, a court would be permitted to dispense with trebling where doing so would substantially reduce the adverse effects of the action on the interests of one or more affected foreign countries.

Finally, the bill would provide for the application of principles of forum non conveniens in private antitrust cases affecting foreign commerce, providing yet another tool for the courts to employ in balancing the respective interests of the parties, the United States and other affected nations. S. 397, § 4.

The Section believes that S. 397 is a well-reasoned proposal to create a comprehensive and systematic framework in which U.S. and foreign national interests can be equitably balanced in private antitrust actions. It would provide badly needed uniformity throughout the federal courts and reinforce current efforts by the Judiciary and the Executive Branch to reduce the international tensions caused by private treble damage actions. At the same time, the bill still allows the courts to exercise extraterritorial antitrust jurisdiction in appropriate circumstances in order to protect the U.S. economy from anti-competitive conduct from abroad. The Section therefore endorses the bill and recommends its passage by Congress. There are, however, a few aspects of S. 397 which the Section believes need to be clarified or improved upon and suggestions for doing so are noted in the report.

I. THE GENESIS OF THE PROBLEM

By its terms, the Sherman Act (15 U.S.C. § 1 et seq.) covers "every contract, combination . . . or conspiracy in restraint of trade" and every person who shall "monopolize . . . attempt to monopolize, or combine or conspire . . . to monopolize" trade or commerce "with foreign nations." When this clause was first interpreted by the Supreme Court in

1909 in American Banana Co. v. United Fruit Co.,[2] it was construed as not covering conduct occurring outside the United States.[3] This decision was, in part, a reflection of the relatively limited role of the United States in the world economy during the early twentieth century as well as the territorial concept of jurisdiction that prevailed in those times.

After World War II, however, all of this changed. The United States emerged as the dominant post-war economy, with increasing commercial ties around the world, and the narrow American Banana limitation on Sherman Act jurisdiction was abandoned in United States v. Aluminum Co. of America ("Alcoa").[4] In that case, Judge Learned Hand held that the Sherman Act's subject matter jurisdiction extended to those cases where the extraterritorial conduct in question was intended to, and did in fact, have an "effect" upon United States commerce.[5] Although the precise formulations have varied, the Alcoa "effects" test has been widely followed in subsequent cases applying the Sherman Act to commerce with foreign nations.[6] In its modern formulation, codified by the Foreign Trade Antitrust Improvements Act of 1982, the effects test requires a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic or import trade, or on the export trade of a person engaged in such business in the United States.[7]

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[2] 213 U.S. 347 (1909).

[3] Id. at 355-56.

[4] 148 F.2d 416 (2d Cir. 1945).

[5] Id. at 443.

As the international economy has become more interdependent and the businesses of other nations have become strong competitors to United States firms in world markets, the *Alcoa* "effects" test has engendered increasing friction between the United States and other countries.[8] The reason is that the test only considers the interests of the United States, without giving any weight to the competing interests of foreign sovereigns.

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[6] *See, e.g., Fleischmann Distilling Corp.* v. *Distillers Co., Ltd.*, 395 F. Supp. 221, 226 (S.D.N.Y. 1975) ("direct and material adverse effect on interstate or foreign commerce"); *Todhunter Mitchell & Co., Ltd.* v. *Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974) ("The flow of commerce . . . was directly restricted."); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F. Supp. 949, 953 (S.D.N.Y. 1968), *petition for cert. denied sub nom.*, *Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969) ("direct and substantial restraint on interstate and foreign commerce of the United States. . . ."); *United States* v. *General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949) ("direct and substantial effect upon trade").

[7] 15 U.S.C.A. § 6a (Supp. 1983). It has also been held that the "effect on U.S. commerce" must be *anticompetitive* in order to sustain antitrust jurisdiction. *See, e.g., National Bank of Canada* v. *The Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981); *Timberlane Lumber Co.* v. *Bank of America*, 574 F.Supp. 1453 (N.D. Cal., Oct. 24, 1984); P. Areeda & D. Turner, *Antitrust Law*, § 234(b), at 255 (1978).

[8] *See generally*, J.R. Atwood & K. Brewster, *Antitrust and American Business Abroad*, ch. 4 (1981).

Tensions between the United States and other nations over antitrust policy are largely the product of the differing competition policies, regulatory regimes, legal systems and forms of business enterprise which have evolved in the U.S. and its trading partners. While the United States is a mixed economy marked by strong antitrust laws, limited government intervention, predominantly private enterprise, and a major emphasis on private litigation, many other nations have promoted their economic development through more centralized industrial policies, state-owned, directed or assisted enterprises, a lesser emphasis on the primacy of competition policies, and virtually no private antitrust enforcement. It is thus not surprising that such widely divergent governmental interests and policies have frequently clashed when private plaintiffs have sought to apply the U.S. antitrust laws extraterritorially. Indeed, the very concept of private treble damage actions with expansive discovery is alien to the legal systems of most other nations, which do not sanction such broad-ranging discovery requests, consider private treble damages to be improperly "penal," and generally rely upon governmental agencies, rather than private parties, to enforce their competition policies.

In response to what they believed to be improper assertions of U.S. antitrust jurisdiction over conduct affecting their national interests, numerous foreign governments have retaliated against the United States by enacting so-called "blocking" statutes, which restrict the extent to which U.S. private litigants can obtain evidence or the production of documents for use in investigations or proceedings in the United States.[9] Further, at least one country has enacted "clawback" provisions that permit its citizens to recover the non-compensatory portion of any treble damage judgment they pay to a prevailing American plaintiff.[10] Indeed, strong diplomatic protests against private treble damage actions have become so serious a problem (the Laker litigation is but the most recent example) that the Secretary of State has identified foreign governmental concerns over U.S. extraterritorial jurisdiction as one of the most divisive economic issues between the United States and its allies.[11]

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[9] To date, variants of a blocking statute have been enacted by: Australia (Prohibition of Certain Evidence Amendment Act, 1976, No. 202 (Austl.)); Canada (Uranium Information Security Regulations, Can. Stat. O. & Reg. 76-644 (P.S. 1976-2368, Sept. 21, 1976)); France (Act of 16th July 1980, French Law No. 80-538, (1980) J.O. 1799); the Netherlands (The Dutch Law of June 28, 1956, Concerning Economic Competition, (1956) Staatsblad 1061, as amended, Law of July 16, 1958 § 39 (1958) Staatsblad 413); New Zealand (1980 NZ Stat. 173, No. 27); South Africa (Atomic Energy Act, 1967, No. 90 § 30, 15 Stat. Repub. So. Afr. 1045 (1977)); Switzerland (StGB, C.P., Cod. Pen. Art. 162 and 273); and the United Kingdom (Protection of Trading Interests Act, 1980, c 11, §6).

[10] See Protection of Trading Interests Act, 1980, c 11., Section 6 (United Kingdom).

Caught in the middle of these international antitrust disputes are those U.S. and foreign businesses which have often been forced into the untenable position of having to choose which nation's laws and policies to follow. For many of these companies, the resulting exposure and uncertainty in their business operations has been substantial. With the United States economy increasingly dependent upon international transactions, it is extremely important to restore legal certainty and fairness to antitrust policy in this area.

In sum, there are paramount national policies which argue in favor of requiring private antitrust actions to strike a balance between the competing national interests of the United States and other countries. As Senator DeConcini has pointed out: "[v]ital foreign policy, defense, and commercial interests of the U.S. Government depend on our maintaining good relations -- on a fair basis -- with our allies and major trading partners."[12]

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[11] See "Trade, Interdependence and Conflicts of Jurisdiction," Address by the Honorable George Shultz, Secretary of State, before the South Carolina Bar Association ("Shultz Speech") (May 5, 1984), reprinted in 84 Dept. of State Bull. 33, 34 (June 1984). Secretary Shultz also stated that in the past year alone the United States has "received more than 25 formal diplomatic demarches . . . from many of our closest allies and trading partners" on extraterritoriality issues.

II. THE NEED FOR A LEGISLATIVE SOLUTION

Despite the widely-recognized "urgency" of the problems in this area,[13] the Judiciary and the Executive Branch have thus far been unable to develop a uniform framework for resolving the conflicts between U.S. and foreign national interests in private treble damage actions. As discussed below, while both of these branches have acknowledged the problems, efforts to resolve them have, at best, been only partially successful.

In the case of the Judiciary, the absence of any express guidance from either the Supreme Court or Congress has left individual federal courts to fend for themselves in determining the appropriate scope of U.S. extraterritorial jurisdiction -- with mixed results for U.S. competition policy and the international order. In the case of the Executive Branch, some progress has been made in ameliorating conflicts with foreign nations as a consequence of private treble damage lawsuits, but more needs to be done in order to ensure that courts will adhere to the comity principles which have been the subject of international agreements. If an effective solution to these problems is to be achieved in the near future, therefore, it appears that legislation will be required to build upon and enhance the reform efforts already initiated by the Judicial and Executive Branches.

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[12] 131 Cong. Rec. S1160 (Feb. 6, 1985).

[13] See Shultz Speech, supra note 11, at 35.

A. Judicial Efforts to Fashion A Jurisdictional Rule of Reason Require Legislative Reinforcement

Recognizing that the Alcoa "effects" test does not give any weight to the interests of other nations, a number of U.S. courts have, in recent years, adopted what amounts to a "reasonabless" limitation on the extraterritorial reach of the U.S. antitrust laws. The leading case to endorse this rule is Timberlane Lumber Co. v. Bank of America.[14] In that case, the Ninth Circuit required a balancing of the competing interests of the United States, affected foreign nations and the international order in order to determine whether, "as a matter of international comity and fairness," U.S. antitrust jurisdiction should be asserted.[15] This "jurisdictional rule of reason" has subsequently been endorsed by a number of other courts,[16] the Departments of Justice and State,[17] antitrust commentators,[18] the Tentative Drafts of the Revised Restatement of the Foreign Relations Law of the United States,[19] and the ABA Antitrust Law Section.[20]

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[14] 549 F.2d 597 (9th Cir. 1976).

[15] Id. at 613.

[16] See, e.g., Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287,
(footnote continued)

Despite all of this support, however, the jurisdictional rule of reason has not yet been universally accepted or effectively employed by United States courts. To begin with, since the Supreme Court has never squarely considered the

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1297-8 (3d Cir. 1979); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161 (E.D. Pa. 1980); Dominicus Americana Bohio v. Gulf & Western Indus., Inc., 473 F. Supp. 680 (S.D.N.Y. 1979). Cf. Industrial Investment Dev. Corp. v. Mitsui & Co., Ltd., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244, reaff'd, 704 F.2d 785 (5th Cir. 1983) (U.S. antitrust jurisdiction should not be asserted if it would violate international comity, but no conflict found to exist in that case).

[17] See, e.g., U.S. Department of Justice, Antitrust Guide for International Operations (Jan. 26, 1977), at pp. 3, 12; Baxter, Antitrust in an Independent World (Sept. 29, 1981); Shenefield, Extraterritoriality and Antitrust -- New Variations on a Familiar Theme (Dec. 10, 1980); Shultz Speech, supra note 11, at 36.

[18] See, e.g., J.R. Atwood and K. Brewster, Antitrust and American Business Abroad Ch. 6 (1981); P. Areeda and D. Turner, Antitrust Law ¶ 239 (Vol. I 1978); Note, Extraterritorial Application of United States Laws: A Conflict of Laws Approach, 28 Stan. Law Rev. 1005 (1976).

[19] See Restatement Of the Law, Foreign Relations Law of the United States (Tent. Dr. No. 6, March, 1985) § 403 and Reporter's Note 10 thereto, which are reprinted in the Appendix.

[20] See Report On Tentative Drafts Nos. 1-4, Restatement Of the Law, Foreign Relations Law Of The United States (Revised), American Bar Association, Section Of Antitrust Law (November 14, 1983).

issue, the Circuit Courts have been left free to interpret and accept or reject the doctrine as they see fit. As a result, some courts have applied very narrow interpretations of the "reasonableness" doctrine.[21] And at least one Circuit Court, while endorsing principles of international comity and reasonableness, has rejected outright the process of judicial interest balancing, absent Executive Branch advice, on policy grounds. See Laker Airways Ltd. v. Sabena, Belgian World Airlines.[22] Moreover, even in those Circuits in which a broad reasonableness limitation is supposedly applied, the courts have demonstrated a decided reluctance to use the jurisdictional rule of reason as a basis for dismissing any action in which the challenged conduct has more than a de minimis effect on U.S. commerce.[23] Finally, because of the absence of any established procedure for applying the reasonableness limitation, courts have generally permitted extensive discovery and pretrial proceedings to go forward before considering whether a balancing of U.S. and foreign national interests renders the exercise of U.S. antitrust jurisdiction inappropriate. Thus, even in *Timberlane*, the *only* case in which the jurisdictional rule of reason has actually been applied to dismiss an antitrust action, it took more than *eight years* for the district court to reach this conclusion, which was subsequently affirmed by the Court of Appeals.[24]

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[21] See, e.g., In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980) (where the foreign defendants had refused to appear and default judgments had been entered, it was held that the lower court did not abuse its discretion by limiting its comity analysis to consideration of the complexity of the multinational action, the seriousness of the charges and the "contumacious" attitude of the defaulters); Industrial Development Corp. v. Mitsui & Co., 671 F. 2d 876, 884-85 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244 (1983).

[22] 731 F.2d 909, 948 (D.C. Cir. 1984).

[23] See cases cited in Laker Airways Ltd., supra, 731 F.2d at 951, n. 156 & 158.

In sum, although judicial efforts to apply a reasonableness limitation on U.S. antitrust jurisdiction are to be commended, their lack of a legislative mandate and *ad hoc* development has seriously restricted their effectiveness.

B. Executive Branch Efforts To Eliminate International Tensions Over Private Treble Damage Actions Would Be Assisted By Legislative Action

On May 5, 1984, Secretary of State George Shultz characterized concerns over U.S. assertions of extraterritorial jurisdiction as a matter of "urgency" to U.S. foreign relations, and highlighted the need to search for solutions.[25]

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[24] *Timberlane Lumber Co.* v. *Bank of America*, 749 F. 2d 1378 (9th Cir. 1984), *aff'g* 574 F. Supp. 1453 (N.D. Cal. 1983).

[25] *See* *Shultz Speech*, *supra* note 11, at 35. *See also* "Extraterritoriality, Conflicts of Jurisdiction and United States Foreign Policy," Address by the Honorable Kenneth W. Dam, Deputy Secretary of State, before the American Society of International Law (Washington, D.C. 1983).

In particular, he emphasized: (1) pursuing bilateral and developing multilateral approaches to resolving differences between national competition policies; and (2) where different national policies cannot be meshed, seeking agreement that countries should "abide by the principle of international comity" and "exercise their jurisdiction only after trying to take foreign interests into account . . . ."[26]

Recognizing the extraterritoriality problem, the Executive Branch has taken a number of positive diplomatic steps to reduce mounting foreign concerns in this area. However, these efforts necessarily have not been able to ensure that U.S. courts will in fact adhere to comity principles and, accordingly, would be enhanced through legislative reinforcement.

Thus, while the United States has entered into bilateral agreements with Australia and Canada which provide that these nations may request that the United States make its views known to courts considering private antitrust actions,[27] these agreements do not contain mechanisms to ensure that U.S. courts will in fact take the legitimate interests of foreign nations into account. Similarly, although recent recommendations by the Committee of Experts on Restrictive Business Practices of the Organization for Economic Cooperation and Development ("OECD") also seek to encourage member countries to intervene in private actions to urge adherence to principles of comity,[28] they too do not provide for any means to ensure that the courts will pay heed to this advice.

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[26] Id. at 36.

[27] See Agreement relating to cooperation on antitrust matters, June 29, 1982, United States-Australia, T.I.A.S. 10365; Joint Statement Concerning Cooperation in Antitrust Matters, Canada-United States, 5 Trade Reg. Rep. (CCH) ¶50,112 (Feb. 22, 1971).

These agreements also provide for notification, consultation and cooperation between the two countries when government-administered competition law investigations or

(footnote continued)

In sum, although Executive Branch diplomatic initiatives have begun to reduce concerns over private treble damage actions, legislation would appear to be a desirable vehicle through which to build upon these efforts on a broader and

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actions are proposed. See, e.g., United States-Australia Agreement, supra, Arts. 1, 2, 4 & 5.

[28] See "Competition Law Enforcement: International Cooperation In The Collection of Information," OECD Committee of Experts on Restrictive Business Practices (1984), Recommendation No. 174.

It should also be noted that the OECD has adopted a recommendation calling for notification, consultation and conciliation procedures when a member country of the OECD proposes to investigate or prosecute restrictive business practices which "substantially and adversely affect" the "interests" of another member country. See Recommendation of the Council concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade, OECD Doc. C(7399) (Final) (Dec. 20, 1973), reprinted in 19 Antitrust Bull. 283 (1974). The Council's Recommendation was subsequently affirmed by the OECD's Council of Ministers in September 1979.

more systematic basis so as to ensure that foreign national interests are always taken into account in private treble damage actions.

III. ANALYSIS OF S. 397

S. 397 is a welcome proposal to build upon and reinforce the efforts which the Judicial and Executive branches have begun to ameliorate the international tensions caused by the extraterritorial application of U.S. antitrust laws in treble damage actions. As explained in detail below, the Section believes that, with a few clarifications or modifications, the proposed legislation would establish an extremely useful framework for resolving the conflicts between U.S. and foreign national interests which frequently arise in such private antitrust lawsuits.

A. Codification Of the Jurisdictional Rule of Reason

The centerpiece of S. 397 is its requirement that a U.S. court enter a judgment dismissing a private antitrust action "whenever it determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action." S. 397, § 3. As explained by Senator DeConcini's statement introducing the bill, this provision "is intended to codify, and improve the operation of, the 'jurisdictional rule of reason' in private antitrust actions involving commerce with foreign nations."[29]

The Section strongly endorses S. 397's codification of the jurisdictional rule of reason as a limitation on the exercise of subject matter jurisdiction in all private antitrust cases.[30] The balancing of interests approach incorporated in this rule is an important tool which would require all U.S. courts to give proper consideration to the interests of *both* the United States *and* other countries before permitting a private treble damage action adversely affecting foreign national interests to go forward.[31]

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[29] 131 Cong. Rec. S. 1162 (Daily Ed. Feb. 6, 1985).

[30] The bill would not be applicable to actions instituted by United States antitrust enforcement agencies because it is generally believed that these agencies already have shown themselves "to be sensitive to the foreign policy implications of antitrust enforcement" and have "moderated [their] enforcement activity accordingly." 131 Cong. Rec. S 1161 (Daily Ed. Feb. 6, 1985). In particular, these agencies carefully weigh the interests of the U.S. vis-a-vis foreign nations before challenging conduct which might encroach on foreign sovereign interests. In contrast, as noted throughout this Report, there is no clearly established mechanism for the weighing of affected governmental interests in private treble damage actions.

[31] The bill does not attempt to codify any of the specific comity factors which have been identified by the courts for balancing U.S. and foreign governmental interests. *See, e.g.*, *Mannington Mills*, *supra*, 595 F.2d at 1298; *Timberlane*, *supra*, 549 F.2d at 614; *Restatement (Second) of the Foreign Relations Law of the United States*, § 40 (1965); *Restatement (Revised) of the Foreign Relations Law of the United States*, § 403 (Tent. Dr. No. 2 1981). Instead, S. 397 leaves the

(footnote continued)

Further, by establishing this principle as a uniform jurisdictional rule to be applied in all private treble damage actions, the legislation would provide greater certainty that U.S. courts will attempt to avoid unnecessary encroachments upon foreign national interests.

There is only one point which the Section believes should be clarified with respect to this portion of the bill. Because there is no definition of when "the interests of one or more foreign nations" may be adversely affected, there might be some confusion over whether actions challenging the extraterritorial conduct of United States corporations can properly trigger such concerns. The Section believes that the bill, as drafted, intends to apply the jurisdictional rule of reason, on a nondiscriminatory basis, in cases where the overseas conduct of either U.S. or foreign corporations is being challenged under the U.S. antitrust laws. Therefore, the Section recommends that the legislative

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particular factors to be employed, and the priorities to be assigned to them, to be determined by the courts, on a case-by-case basis, in light of the relevant facts and circumstances before them.

To facilitate the proper working of the comity test, the legislative history of the bill could make it clear that the courts should not automatically exercise extraterritorial jurisdiction whenever they determine that important U.S. interests are implicated. Rather, the courts should instead weigh these interests against those of affected foreign nations before determining whether the exercise of U.S. antitrust jurisdiction is appropriate.

history clearly reflect this fact. As Senator DeConcini has pointed out:

> The U.S. corporation doing business abroad must also have some reassurance that it will not become caught in between the sometimes inconsistent regulatory responsibilities of governments. Even if a foreign government does not affirmatively require a U.S. corporation to do business in a way that could pose antitrust problems, the foreign government may well condone and encourage cooperative practices among competitors that the U.S. corporation ignores at its own business peril in the foreign market.[32]

Foreign governments can have a strong and legitimate interest in seeing that U.S. corporations doing business in their countries, and adhering to their national policies, are not unreasonably subjected to U.S. antitrust liability as a result.[33]

For these reasons and to avoid hindering U.S. corporations from doing business abroad, the legislative history should make it clear that the balancing of interests test applies where the extraterritorial conduct of U.S. companies is subject to scrutiny in private antitrust

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32. 131 Cong. Rec. S1160 (Daily Ed. Feb. 6, 1985).

33. In this connection, the legislative history should also make it clear that the bill does not alter the protections which may be afforded to such behavior by the sovereign compulsion and act of state doctrines.

actions. Further, either the text of the bill or the legislative history should indicate that, consistent with conflict of law principles, the factors to be considered under the balancing test should include not only the interests of the foreign governments involved, but also the legitimate expectations and interests of the parties, including their reliance interests in adhering to foreign laws and policies.[34] Consideration of such interests is necessary to ensure the smooth functioning of the international commercial order, which requires that competitors not be penalized for acting in a manner consistent with the law and policies of their host nations.

B. Soliciting The Views Of The U.S. Government And Affected Foreign Governments

S. 397 also provides that, upon the request by a court, the United States government must set forth its views "as to the effects of the [antitrust] action on the interests of the United States and on any affected foreign nation." S. 397, § 3. Subject to the proposed modifications set forth below, the Section endorses this proposal, which enables the courts to draw on the foreign policy expertise of the Executive

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[34] *See* Restatement Of The Law, Foreign Relations Law Of The United States (Revised), § 403(2)(d) (treating "the existence of justified expectations that might be protected or hurt by the regulation in question. . ." as a factor in the balancing test).

Branch in determining the relative effects of a private antitrust action on U.S. and foreign national interests.[35] Indeed, there is no better source of information concerning the effect of a private antitrust suit on U.S. national interests than the U.S. government itself. Accordingly, as Senator DeConcini points out, the views of the Executive Branch with respect to the impact on U.S. interests and policies should be given substantial weight by the courts.[36]

There are two respects in which the Section believes that this proposal should be amended. First, Section 3 of the bill should be modified so as to require that the courts request the views of the United States in cases where they apply the interest balancing test. Second, the legislation should make it clear that the U.S. government is not required to advise the court with respect to any issues it deems sensitive if providing the court with such advise would adversely affect U.S. interests or policies.[37]

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[35] A similar procedure has been recommended by the Committee of Experts on Restrictive Business Practices of the OECD. See "International Cooperation in the Collection of Information," Report of the Committee of Experts on Restrictive Business Practices of the OECD (1984).

[36] See 131 Cong. Rec. S1162 (Feb. 5, 1985).

[37] Section 5 of the bill, which, as now drafted, requires the U.S. government to "appear to set forth" its views on whether single damages should be awarded, should also be amended in the same manner.

By mandating judicial recourse to the Executive Branch, this provision, as amended, would answer the legitimate concerns of such informed critics of the balancing test as Judge Wilkey, whose opinion in the Laker case expressed the concern that the Judiciary is ill-equipped to balance the political interests of the U.S. and other affected nations.[38] Formalizing the process by which the U.S. may present its views concerning the relative impact of the lawsuit on U.S. and foreign national interests would place the Judiciary in the most advantageous position possible to make the appropriate comity determination.[39]

At the same time, affording the U.S. the discretion not to set forth its views on sensitive issues in a particular case is consistent with both constitutional principles of separation of powers and considerations of U.S. foreign policy.[40] In this regard, national security or foreign policy considerations may, in certain circumstances, dictate that the U.S. government not express its views on certain issues in private antitrust lawsuits. Thus, while S. 397

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[38] See 731 F.2d at 949-952.

[39] See 131 Cong. Rec. S 1162 (Feb. 5, 1985).

[40] See, e.g., United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Chicago and Southern Airlines, Inc. v. Watermen Steamship Corp., 333 U.S. 103 (1934).

should strongly encourage U.S. government participation in order to assist the courts in interest balancing, it nevertheless should not make mandatory the rendering of advise on all such issues.[41]

The Section also believes that this new procedure could be successfully expanded so as to further facilitate the balancing of interests by the Judiciary. Specifically, it is suggested that it be made clear, through either legislative history or modification of the bill, that U.S. courts are authorized and encouraged to request that the Executive Branch, where it deems it appropriate, solicit, and refer to the courts the views of any foreign governments affected by the action.[42] Such foreign government views would obviously be the best source of information on any foreign national interests at stake. Indeed, as confirmed by longstanding judicial authority, representations contained in official foreign government statements setting forth their sovereign laws, actions and policies are entitled to be afforded "conclusive" evidentiary effect by United States courts.[43] Thus, while it would still be up to the courts to strike the proper balance between competing U.S. and foreign national interests, the opportunity to solicit the views of all affected governments would place the Judiciary in a far better position to carry out this difficult task.

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[41] The legislative history should also make it clear that no inference should be drawn from the failure of the U.S. government to present its views in a particular case. Such a failure may be based on any number of valid foreign policy grounds, and consequently, should not be given any weight in the judicial balancing of affected governmental interests.

[42] While Senator DeConcini recognizes that the Executive Branch "can be expected to have consulted with affected foreign nations" before expressing its views to the court, (131 Cong. Rec. S1162 (Daily Ed. Feb. 5, 1985)), the bill does not expressly establish a mechanism to obtain such foreign government views. It is for this reason that the Section believes that the bill or its history should make it clear that such recourse to affected foreign governments is available.

C. Early Consideration of Motions to Dismiss Based On *Interference With Foreign National Interests*

S. 397 also mandates that motions to dismiss based on interference with foreign national interests be heard and determined "before conducting or permitting the parties to conduct any further proceedings in the action." S. 397, § 3.

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[43] *See*, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 221 (1942); *Banco de Espana* v. *Federal Reserve Bank of New York*, 114 F.2d 438, 443-444 (2d Cir. 1940); *The Claveresk*, 264 F. 276 (2d Cir. 1920); *Agency of Canadian Car & Foundry Co.* v. *American Can Co.*, 258 F. 363 (2d Cir. 1919); *Malka* v. *E.F. Hutton & Co., Inc.*, 465 F. Supp. 131, 138 (S.D.N.Y. 1979); *D'Angelo* v. *Petroleos Mexicanos*, 422 F. Supp. 1280, 1283-1285 (D. Del. 1976), *aff'd per curiam* 564 F.2d 89 (3d Cir. 1977); *Occidental Petroleum Corp.* v. *Buttes Gas and Oil Company*, 331 F. Supp. 92 (C.D. Cal. 1971) *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert*. *denied*, 409 U.S. 950 (1972); *United States* v. *Melekh*, 190 F. Supp. 67, 87 (S.D.N.Y. 1960). *See also* *Brief For the United States As Amicus Curiae,* in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Co.*, No. 83-2004, *cert. pndg.*, at 6, 26 (filed January 1985); American Bar Association, Section of Antitrust Law, *Antitrust Law Developments (Second)* 562 n. 272 (1984).

The Section also endorses this provision, which recognizes that even the successful invocation of such motions may not prevent a serious affront to foreign sovereignty if they are not decided until after long and burdensome pretrial proceedings. By requiring the early resolution of such motions and staying all other proceedings in the interim, the legislation would enable foreign national interests to be taken into account before the discovery disputes and other pre-trial conflicts which have caused such serious international tensions in the past.

Indeed, one of the most important benefits of this new procedural device could be the avoidance of unnecessary foreign discovery disputes. As noted above (supra, at 8-9), many foreign governments have voiced vigorous objection to the wide-ranging discovery of foreign documents that is typically sanctioned in U.S. treble damage actions and some have even retaliated by enacting so-called "blocking" statutes. Many of these discovery disputes might have been avoided had there been a procedural mechanism available to first balance the competing national interests at stake.

In this regard, the Section believes that the proposed legislation, which authorizes such "discovery . . . as the court deems appropriate" on motions to dismiss for interference with foreign national interests, S. 397, § 3, is intended to avoid unnecessary disputes over the discovery of foreign documents. While a certain amount of discovery of foreign documents may, in some cases, be necessary for U.S. courts to adjudicate motions based upon foreign national interests, the Section believes that such discovery should properly be limited to those requests reasonable under the circumstances.[44] A clarification to this effect in the legislative history would reduce international tensions without sacrificing the legitimate need of U.S. courts to have an informed basis in considering motions to dismiss based on foreign national interests.

To assist the courts in determining what, if any, discovery of documents or information located abroad is needed, the Section further recommends that the legislative history should make it clear that the courts are authorized to solicit the views of both the United States and concerned foreign governments on this issue. In many cases, where the

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[44] See Report on Tentative Drafts Nos. 1-4, Restatement of the Law, Foreign Relations Law of the United States (Revised), American Bar Association Section of Antitrust Law (Nov. 14, 1983), at 30. The Tentative Draft of the Revised Restatement would go even further, and only authorize U.S. courts to order the production of "documents or other information directly relevant, necessary, and material, to an action or investigation, even if the information or the person in possession of the information is located outside the United States." See Restatement of the Law, Foreign Relations Law of the United States (Revised), § 420(1)(a) (Tent. Dr. No. 3, March 15, 1983).

U.S. government and affected foreign governments have set forth the competing national interests at stake, it may not be necessary for the courts to sanction any discovery of information located abroad before resolving the dismissal motions before them.

The Section also believes that this new procedural device should be extended to require the early consideration of motions to dismiss, or motions for summary judgment, based on the act of state and sovereign compulsion doctrines, which doctrines prevent U.S. courts from holding either foreign governmental conduct or private conduct compelled by a foreign government to constitute a basis for antitrust liability.[45] Like the adjudication of motions to dismiss based on foreign national interests, motions based on the act of state or sovereign compulsion doctrines should be resolved before extensive discovery on the merits and other burdensome pretrial proceedings which could cause the very intrustion into foreign sovereign interests that these doctrines are designed to prevent.

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[45] *See*, *e.g.*, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909); *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) (act of state doctrine); *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); *Timberlane Lumber Co.* v. *Bank of America*, 549 F.2d 597, 606 (9th Cir. 1976); *Bryant* v. *International Schools Service, Inc.*, 502 F. Supp. 490 (D.N.J. 1980); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1296-98 (D. Del. 1970) (sovereign compulsion doctrine).

Consideration should also be given to extending this procedural mechanism to the defenses available under the Foreign Sovereign Immunities Act, 28 U.S.C. §1330 *et seq*., which also can be asserted in private antitrust actions.

D. Early Consideration Of Motions to Dismiss Based On Subject Matter Jurisdiction

S. 397 also mandates that motions to dismiss based on lack of subject matter jurisdiction be heard and determined "before conducting or permitting the parties to conduct any further proceedings in the action." S. 397, § ~~3~~ 2. The Section believes that this section of the bill should be deleted.

Because issues of foreign national interests, act of state and sovereign compulsion would be adjudicated early in antitrust lawsuits under Section 3 of S. 397, subject matter jurisdiction motions not raising these issues would not ordinarily present the same risk of adverse effects on foreign national interests so as to require that their early consideration be *mandated*. Although courts generally do try to consider issues of subject matter jurisdiction early in *any* litigation, there may be sound reasons for not doing so in particular cases. For example, in antitrust cases, there are some actions in which the issue of subject matter jurisdiction and the consideration of the merits are so intertwined that it would be preferable to defer resolution of the jurisdictional issue until after the completion of merits discovery. The Section therefore believes that courts should be left with the discretion to determine at what point to adjudicate such jurisdictional motions.

E. The Detrebling Proposal

The Section also endorses the detrebling provision of S. 397 which limits an antitrust plaintiff's recovery to *actual* damages (plus interest and litigation costs) in those foreign commerce cases in which substantial adverse effects on the interests of a foreign nation would be reduced if *treble* damages are not awarded. S. 397, § 4(a). As the treble damage remedy is a unique feature of U.S. antitrust law that many foreign governments find highly objectionable, curtailing its application in private actions which adversely affect foreign national interests would significantly aid in reducing the international tensions caused by the extraterritorial application of the U.S. antitrust laws.[46]

As explained by Senator DeConcini, the detrebling proposal provides an additional, new tool which can substantially ameliorate the degree of conflict between the interests of the U.S. and adversely affected nations.[47] Until now, the courts have had only two alternatives in dealing with such conflicts: to "stop the action altogether" (on the basis of subject matter jurisdiction or international comity standards) or to "permit the action to go forward without limitation."[48] The detrebling proposal recognizes that vital foreign interests may still be at stake, and entitled to some deference, in private antitrust actions which are permitted to go forward (*i.e.*, where affected foreign national interests do not outweigh the U.S. interests at stake but are nonetheless still important). The proposal would also enable United States courts to exercise subject matter jurisdiction in cases where foreign interests are substantially equivalent to those of the United States, but because the penal element of antitrust liability is eliminated, it would be considered reasonable for U.S. jurisdiction to be exercised.

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[46] *Accord*, Garvey, George E., *Study Of Antitrust Treble Damage Remedy*, Report to the Comm. On Jud. U.S. House of Representatives (Jan. 23, 1981), *reprinted* in 46 Antitrust & Trade Regulation Report 356 (March 1, 1984).

F. *Forum Non Conveniens*

Finally, the Section supports the provision of S. 397 which requires that the common law doctrine of *forum non conveniens* be applied in private antitrust actions involving foreign commerce. Under this well-established principle, a court may decline jurisdiction over an action in favor of an alternative forum, including a foreign tribunal, where adjudication of the claim would better serve the overall convenience of the parties and the courts and be in the interests of justice.[49]

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[47] 131 Cong. Rec. S1163 (Daily Ed. Feb. 6, 1985).

[48] *Id*.

While it is well-established that the forum non conveniens doctrine can be used to transfer a private antitrust action to another district court,[50] a number of recent decisions suggest that the doctrine cannot serve as the basis for dismissing a U.S. antitrust claim where the more convenient alternative forum is a foreign court.[51] As a consequence, antitrust suits are the only federal regulatory actions which must be retained in U.S. courts even when convenience and justice dictate the transferral of the case to foreign courts.[52]

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[49] See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1961).

[50] See 28 U.S.C. § 1404(a) (providing that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."); National City Lines II, 337 U.S. 78 (1949) (holding that 28 U.S.C. § 1404(a) requires the application of the forum non conveniens principle embodied therein ~~t~~to antitrust actions).

[51] See Industrial Investment Development Corp. v. Mitsui Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244 (1983); Laker Airways Ltd. v. Pan American Airways Ltd., 568 F. Supp. 811 (D.D.C. 1983).

[52] 131 Cong. Rec. S1163 (Daily Ed. Feb. 6, 1985).

S. 397 properly rectifies this anomaly by requiring that antitrust actions must also be remitted to foreign courts where *forum non conveniens* principles so dictate. This proposal is a useful adjunct to the jurisdictional rule of reason and provides another tool by which the international tensions caused by some private treble damage actions may be ameliorated.

CONCLUSION

In sum, the Section strongly endorses S. 397 and recommends that, with the few modifications suggested, it be enacted by Congress with all deliberate speed. The legislation is an excellent proposal for building upon the efforts already initiated by the Judiciary and the Executive Branch to resolve the conflicts caused by U.S. treble damage actions in an increasingly interdependent world.

APPENDIX

RELEVANT EXCERPTS FROM TENTATIVE DRAFT NO. 6, RESTATEMENT OF THE LAW, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED)

§ 403. Limitations on Jurisdiction to Prescribe

(1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to the activities, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.

(2) Whether the exercise of jurisdiction is reasonable or unreasonable is judged by evaluating all the relevant factors, including, where appropriate,

(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial, direct, and foreseeable effect upon or in the regulating state;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation in question;

(e) the importance of the regulation in question to the international political, legal or economic system;

(f) the extent to which such regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by other states.

(3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by two or more states are in conflict, each state is expected to evaluate its own as well as the other state's interest in exercising of jurisdiction in light of all the relevant factors, including those set out in Subsection (2); and to defer to the other state is that state's interest is greater.

REPORTER'S NOTES

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10. Previous Restatement. This section draws on portions of §§ 7, 17, 18 and 40 of the previous Restatement, and follows § 40 in setting forth considerations to be evaluated in cases of conflict of jurisdiction. The factors set forth in the present section, however, are not identical with those in previous § 40, and derive also from the factors listed in § 6 of the Restatement, Second, of Conflict of Laws, and take account as well of developments in the practice of other states. In contrast to prior § 40, reasonableness in all the relevant circumstances is understood here not as a basis for requiring that states consider moderating their enforcement of laws which they are authorized to prescribe, but as an essential element in determining whether, as a matter of international law, the state has jurisdiction to prescribe.

Mr. STARLING. The committee would like to submit questions to you from the Senators to be answered in writing. We apologize that Senator Thurmond, who did plan to be here, was unavoidably detained in an earlier appointment.

On behalf of Senator Thurmond, the chairman, and Senator DeConcini, the sponsor, I would like to thank all of the witnesses for appearing today and contributing to the record on this bill.

Thank you.

[Whereupon, at 11:15 a.m., the committee was adjourned.]

FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985—S. 397

TUESDAY, OCTOBER 15, 1985

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:18 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, (chairman of the committee) presiding.

Staff present: Kenneth Starling, antitrust counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

I had to open the Senate at 10 and I regret the delay of a few minutes.

We are meeting today to hear further testimony on a bill introduced by our distinguished colleague from Arizona, Senator DeConcini. The bill would create certain judicial mechanisms through which foreign interests adversely affected by private antitrust suits would be acknowledged by the courts and balanced against the interests of the plaintiffs.

The general concern addressed by Senator DeConcini's bill is that private antitrust law enforcement which threatens an application of United States law to parties outside the United States may work to the ultimate disadvantage of U.S. foreign relations and the ability of U.S. companies to do business with foreign companies.

At the first hearing on this bill on June 21, the Departments of State and Justice expressed some concerns and objections to the bill. Those objections relate to the jurisdictional balancing and detrebling portions of the bill.

Since the first hearing, Senator DeConcini has revised his bill, taking some of the administration's concerns into account. I understand that Senator DeConcini has provided a copy of the revised bill to the State and Justice Departments and that the committee will receive their written responses to the revisions.

[Prepared statement and revised bill of Senator DeConcini follow:]

STATEMENT BY
SENATOR DeCONCINI ON THE
FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985

Mr. Chairman, I am most pleased that today the Committee will be holding its second and final day of hearing on the Foreign Trade Antitrust Improvements Act of 1985. The bill is designed to ameliorate the serious economic and political problems that can and do arise when the United States applies its antitrust laws to international trade and commerce. I have reworked my initial bill and I believe copies of the reworked copies have been sent to the witnesses. The bill now incorporates several clarifications and modifications to reflect the very useful testimony of the witnesses at the June 21 hearing and the consultations among interested parties that have taken place since the hearing.

At the June 21 hearing, my proposed legislation was subject to thoughtful, extensive scrutiny by the representatives of the Departments of State and Justice, the International and Antitrust Sections of the American Bar Association, and the private international antitrust bar. In addition, written submissions were received from the Federal Trade Commission and the Bar Association of the City of New York. Finally, Mr. Chairman, I have continued to receive formal and informal communications of support and constructive criticism from individuals in the business, governmental, academic and private legal sectors, both in the United States and abroad.

From all these sources, I think it is fair to say that there is strong agreement with my judgment that the Congress should act to reduce the conflicts between the United States and its trading partners over private antitrust enforcement. Reducing such conflicts is in the interests of the United States and of U.S. corporations doing business internationally, for reasons that I have set forth in my statements before this body on February 6, 1985, when I first introduced this legislation, and on February 27, 1985, when I shared with you the initial favorable reactions to the bill. Everything that I have heard strengthens my conviction that we are on the right track with this bill, that it is in fact long overdue, and that we should press forward to complete the legislative process and secure its enactment.

At the same time, there are improvements to be made in my original bill, and before we can get full agreement on this legislation, there are a number of different points of view, some of them quite valid, that will have to be taken into account. Thus, strong opposition was expressed by the Administration witnesses to authorizing the courts to resolve foreign policy questions that should be left to the Executive Branch. Other less serious problems were raised by some of the witnesses, ranging from the statement of the Justice Department representative that the detrebling authority in the bill should be delayed until a law school study of private treble damage actions is completed, to the question of whether the dismissals and detrebling orders authorized by the bill would apply to all defendants, U.S. and foreign alike.

In my judgment, Mr. chairman, the bill that I am circulating today solves the problems identified in the original bill and accommodates the legitimate concerns of the Administration witnesses of the bill. Indeed, in my judgment the revised bill is a better bill, not just a compromise. It is my hope and expectation that this new draft, as revised and clarified, will gain the active support of the Justice and State Departments.

The major modifications and clarifications in the Foreign Trade Antitrust Improvements Act of 1985 that I reintroduce today may be summarized as follows.

First. In Sections 2(b), 3(b) and 5(b), providing for early judicial determination of motions based on the substantive provisions of these sections, I have adopted the suggestion of the Bar Association of the City of New York that while there should be a presumption favoring a stay of proceedings on the merits until these motions are decided, for good cause shown the court should be permitted to allow discovery on the merits to proceed during the pendency of the motion or motions. This change will reduce the temptation of defendants to file unmeritorious motions to dismiss or limit damages simply as a tactic to prevent the plaintiff from obtaining discovery on the merits that will be less effective if delayed (as where plaintiff faces the imminent loss of needed testimony or documents).

Second. Several important changes have been made in the substantive provisions of Section 3, providing courts with the authority to dismiss private antitrust damage actions that unnecessarily create international conflicts. To begin with, I have rephrased the operative jurisdictional test to rest explicitly on the "jurisdictional rule of reason" that is well recognized, even if not always applied, in American antitrust jurisprudence. This change has the advantage of making it clear that the bill's "balancing test" requires consideration not only of the foreign interests that may be affected by the private antitrust action but also the U.S. interest in promoting an efficient international trading system in which U.S. nationals engage in mutually beneficial commerce with foreign firms. This interest will be served by promoting the international system values inherent in the traditional concept of "comity," such as fairness to parties engaged in international trade, protection of justified expectations, efficiency in business decision-making and dispute resolution, and the like.

Next, I have purged the balancing test of any suggestion that the court, in applying the jurisdictional rule of reason, should consider any foreign policy issues that are the exclusive province of the Executive Branch. This result has been accomplished by giving examples of the factors to be considered by the court in deciding whether to exercise jurisdiction over a private antitrust case involving international commerce. The factors specified are drawn principally from the Timberlane decision and Kingman Brewster's seminal discussion in 1958; excluded are the more "political" considerations added in Mannington Mills, as well as the too narrow formulations of the relevant foreign interests in the 1965 Restatement of U.S. Foreign Relations Law. I trust that this will satisfy the concerns of State and Justice over the Judicial Branch intruding into questions of foreign relations for which the Executive Branch is responsible.

Consistent with the foregoing clarifications, the role of the Attorney General in private antitrust cases affecting foreign national interests should be somewhat different from what was provided in the original draft of the bill. With the balancing test depoliticized and focused on the traditional legal concept of comity, the court will not require the assistance of the Attorney General in applying the test. Such assistance should, however, be offered by the Justice Department as a matter of discretion more frequently than is now its practice, and the bill thus provides in Section 3 for the court to invite the United States to express its views on motions to dismiss on comity grounds. On the other hand, where political foreign policy considerations dictate that jurisdiction should not be exercised, the Executive Branch should play the decisive role. In such a case what is required from the Attorney General is a certification that the Executive Branch has determined that the action will interfere with the conduct of U.S. foreign relations and ought therefore to be dismissed. A new subsection provides for such certification and dismissal.

Third. Section 5, the detrebling provision, continues in the revised bill to perform the vital function of mitigating the impact on the international trading system of antitrust damage actions that raise substantial comity issues but do not quite meet the requirements for outright dismissal under Section 3. Section 5 remains, therefore, a carefully limited step toward harmonizing the U.S. antitrust enforcement scheme with the competition laws of our trading partners and allies, who strongly object to our treble damage remedy. As redrafted, however, Section 5 attacks the problem in a somewhat different way.

Revised Section 5 contains, in addition to clarifying and conforming changes, two principal changes consistent with its basic purpose. One is that as redrafted, Section 5 now provides that in considering detrebling the court should address the basic question of whether, even when it is reasonable for the court to permit the action to go forward, it is more reasonable that the action go forward only for compensatory, not punitive, damages. The factors that are relevant to determining whether the action would better satisfy comity requirements if it were detrebled are essentially the same factors that are relevant in applying the jurisdictional rule of reason, and the redrafted bill makes a cross-reference to Section 3 at the appropriate point in Section 5.

The other major change in Section 5 is the addition of a new provision authorizing the court to refuse to detreble if to do so would substantially impair U.S. antitrust enforcement interests. Some of the factors bearing on this determination are specified in the text of the bill. I believe that limiting private antitrust actions to actual damages in cases raising substantial comity issues will, in the great majority of such cases, not significantly impair any U.S. enforcement interest, and I believe that in applying the specified factors and other appropriate considerations the courts will come to the same conclusion.

Fourth. The language of both Sections 3 and 5 has been clarified to remove any possible doubt about the equal applicability of these sections to U.S. as well as foreign defendants. If any action is to be dismissed under the jurisdictional rule of reason, it is to be dismissed as to all defendants, U.S. as well as foreign. If the action is to be limited to single damages, it is to be so limited as to all defendants, U.S. as well as foreign. That was, I submit, the clear purport of the original text of the bill, but I am happy to put the question entirely to rest in this revision.

Mr. Chairman, this last point leads me to conclude by emphasizing the important benefits that will accrue to U.S. companies doing business internationally and thus to U.S. economic interests if the Foreign Trade Antitrust Improvements Act is enacted into law. At the present time, the overbroad exercise of U.S. jurisdiction in private antitrust cases subjects U.S. firms and their foreign subsidiaries and affiliates to added risks and unnecessary uncertainty about the legal consequences of their business conduct abroad. Moreover, U.S. "extraterritoriality" angers our trading partners and contributes to a climate of international opinion in which U.S. business interests are too often considered fair game for retaliatory or discriminatory legal action by foreign governments. And because the U.S. antitrust enforcement interest is so attenuated in so many of these cases, we get virtually nothing in return for all the trouble we cause ourselves. It is time for our courts to exercise a little judicial restraint in applying U.S. antitrust to international commerce, so that we do not unnecessarily burden U.S. companies' efforts to compete, for the good of the United States, in foreign and international markets.

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99th CONGRESS
1st Session S. _____

IN THE SENATE OF THE UNITED STATES

Mr. DeConcini introduced the following bill; which was read twice and referred to the Committee on ____________________

A BILL

To amend the Sherman and the Clayton Act to modify the application of such Acts to international commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the ''Foreign Trade Antitrust Improvements Act of 1985''.

Sec. 2. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by--

(1) inserting ''(a)'' before ''This Act''; and

(2) adding at the end thereof the following new subsection:

''(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made in any action under the antitrust laws, the judge designated to hear and determine the case shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.''.

Sec. 3. The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding after section 20 the following new section:

''Sec. 21. (a) Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws which involves trade or commerce with a foreign nation, the court shall enter a judgment dismissing the action as to all parties whenever it determines that the jurisdictional rule of reason requires such dismissal. In determining whether to dismiss the action, the court shall consider, as appropriate and without limitation except as provided in this Act, such factors as--

''(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad,

''(2) the nationality of the parties and the principal place of business of corporations,

''(3) the presence or absence of a purpose to affect United States consumers or competitors,

''(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad,

''(5) the existence of reasonable expectations that would be furthered or defeated by the action,

''(6) the degree of conflict with foreign law or foreign economic policies, and

''(7) the effect of the exercise of jurisdiction on international commerce.

''(b) Whenever a motion to dismiss pursuant to the jurisdictional rule of reason is made under this section, the court shall, after such discovery or other proceedings directly related to the motion as the court deems appropriate, and except for good cause shown, hear and determine such motion before conducting or permitting the parties to conduct any further proceedings in the action. The court shall notify the Attorney General upon the filing of any such motion and invite the views of the United States as to proper disposition of the motion.

''(c) If, in any action brought subsequent to the date of enactment of this section by any person or State under the antitrust laws or similar State laws and involving trade or commerce with a foreign nation, the Attorney General certifies to the court that the action will interfere with the conduct of the foreign relations of the United States, then the court shall enter a judgment dismissing the action as to all parties.''.

Sec. 4. Section 12 of the Clayton Act is amended by--

(1) inserting ''(a)'' before ''That suit''; and

(2) adding at the end thereof the following:

''(b) The doctrine of forum non conveniens shall be applicable in any suit, action, or proceeding under the antitrust laws that involves trade or commerce with a foreign nation, and nothing contained in this section or any other venue provision applicable to such suits, actions, or proceedings shall be construed to prevent dismissal of such suits, actions, or proceedings on the ground of forum non conveniens.''.

Sec. 5. The Clayton Act is amended by adding after section 4H the following:

''Sec. 4I. (a) Notwithstanding sections 4 and 4C, and in lieu of the relief provided for in such sections, and notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person or State entitled to recovery on a claim under such section or provision shall recover (1) the actual damages sustained by such person or, in the case of a claim under section 4C, the total damage as described in subsection (a)(1) of such section, (2) interest calculated at the rate specified in section 1961 of title 28, United States Code, on such actual damages or the total damage as specified in subsection (d) of section 4 of the National Cooperative Research Act of 1984 (15 U.S.C. 4303(d)), and (3) the cost of suit attributable to such claim, including a reasonable attorney's fee, if such claim results from conduct occurring in the course of trade or commerce with a foreign nation and the court determines that--

''(A) the exercise of jurisdiction over the claim would be more consistent with the jurisdictional rule of reason if the claim were limited to actual damages or total damage as provided herein, and

''(B) the antitrust enforcement interest of the United States would not be substantially impaired if the claim were limited to actual damages or total damage as provided herein. In determining whether limiting the claim to actual damages or total damage renders the exercise of jurisdiction more consistent with the jurisdictional rule of reason, the court shall consider, as appropriate and without limitation except as provided in this Act, the factors specified in section 21(a) of this Act. In determining the effect of the limitation to actual damages or total damage on the antitrust enforcement interest of the United States, the court shall consider, as appropriate and without limitation except as provided herein, such factors as the nature of the violation claimed, the availability of governmental criminal or civil proceedings, the likely effect on the plaintiff's prosecution of the action if the claim is limited to single damages or total damage, and the existence of other private plaintiffs.

''(b) Whenever a motion to limit damages is made under this section, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action. The court shall notify the Attorney General upon the filing of any such motion and invite the views of the United States as to the proper disposition of the motion.''.

The **Chairman**. Today, we have further testimony from representatives of business groups whose members are engaged in foreign commerce. We welcome those witnesses and look forward to their testimony.

Our witnesses today—we have two, Thomas B. Leary, Esq., Hogan & Hartson, Washington, DC, on behalf of the Business Roundtable. If you will come around, Mr. Leary?

And Bert W. Rein, Esq., Wiley & Rein, Washington, DC, on behalf of the Chamber of Commerce of the United States.

Mr. Leary, we will be glad to hear from you.

STATEMENT OF A PANEL CONSISTING OF: THOMAS B. LEARY, ESQ., HOGAN & HARTSON, WASHINGTON, DC, ON BEHALF OF THE BUSINESS ROUNDTABLE; AND BERT W. REIN, ESQ., WILEY & REIN, WASHINGTON, DC, ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. **Leary**. Mr Chairman, my name is Tom Leary and I am testifying for the Roundtable.

The **Chairman**. Do you think you could present this in about 10 minutes and put your whole statement in the record, if necessary?

Mr. **Leary**. Yes, sir. I have filed a full statement and I would just like to emphasize in this oral portion three points. First of all, I think it would be a mistake to assume that the benefits of this bill will be felt only in the occasional case when a court has to actually apply the jurisdictional rule of reason.

As you indicated in your opening statement, the controversy over the extraterritorial reach of the antitrust law has become heated, and this controversy, we believe, has affected the climate within which American businesses have to operate abroad.

And we feel that congressional recognition of this problem, as in S. 397, will have a spillover beneficial effect on American business abroad that goes beyond the specific area of antitrust and that goes beyond the specific application of this bill in an actual litigated case.

As a matter of fact, this bill may not actually change the ultimate outcome of any particular case. The result may not be necessarily different, but the mode of analysis will be different.

It also means under this bill that courts are not bound by a rigid or formalistic view of U.S. extraterritorial antitrust jurisdiction. There are some anomalous situations that can arise under present law that I think everybody recognizes.

Just to give you one specific example, two people in this country can get together in an overt price-fixing conspiracy perfectly legally so long as that conspiracy is directed at sales overseas.

Conversely, two people in a foreign country operating perfectly legally under the laws of that country can be held liable under our antitrust laws if there is the requisite effect on U.S. import commerce.

I am not saying that that is wrong, but I am saying that that kind of a situation can obviously create friction with some of our friendly foreign trading partners and create problems.

This bill gives a court the discretion to determine whether or not the U.S. antitrust enforcement interest is sufficiently involved in that conduct to justify assuming jurisdiction.

Now, the second point I would like to make is that under the standards set forth in this bill, courts are not asked to make political judgments; that is, they are not asked to evaluate whether domestic or foreign competition law is superior.

There was some merit to the objections that the Department of State and the Department of Justice lodged with the earlier bill. This bill is responsive to those objections. Under section 3 and section 5 of this bill, the court is asked to look at objective factors, not to engage in value judgments.

In the written statement that I filed on behalf of the Roundtable, I have drawn an analogy to certain other determinations which have to be made in our legal system that raise similar considerations and that courts seem to be able to handle.

One example that you might want to consider is the so-called State action case in this country, in a purely domestic context, when a court has to decide whether or not to apply Federal antitrust law in the face of a claim that a sovereign State has regulated the activity.

It is not an easy determination and the cases are difficult, but it is clear that courts can approach this determination without exercising personal judgments about the wisdom of a particular State regulation. I think that analogy is a useful one when considering this legislation.

The final point I would like to make is to address the suggestion at the first round of hearings that the action with respect to the treble damage alternative in section 5 be deferred pending the results of the so-called Georgetown study on treble damages.

I personally know a lot about that Georgetown study because I have been on their advisory board since the study was in its infancy and I am an enthusiastic supporter of it. I think that it is going to be a very exciting event when the findings of that study are discussed at a conference just 3 weeks from now.

But I can assure you that no one expects the Georgetown study to provide definitive answers to broad questions about the treble damage remedy or to substitute in any way for the necessary debate which may follow in this Congress.

What the Georgetown study will do is sharpen the questions. It may dispel some myths. It will certainly focus the controversy, but it certainly will also not eliminate the controversy.

The study is not focused on the international problem that is being addressed here. We are not talking here about broad applications of the treble damage remedy. We are talking about a very specific situation.

This is really not a controversial step that we are considering today in S. 397. Treble damages can be a unique irritant in the international context. We have seen that, and there has been testimony about that earlier.

If we are applying a controversial remedy like treble damages in the international context, we ought to be sure that there is a compelling U.S. interest for doing so. That is all this bill says.

The Business Roundtable believes that the Congress can act now on that problem without prejudice to the broader deliberations that may be stimulated by the Georgetown study. On behalf of the Business Roundtable, then, we urge favorable consideration of this bill.

Thank you.

[The statement follows:]

Statement of

The Business Roundtable

In Support of S. 397, The Foreign Trade
Antitrust Improvements Act of 1985

by

Thomas B. Leary, Washington, D.C.

Introduction

My name is Thomas Leary and I am a member of the firm of Hogan & Hartson, Washington, D.C. This Statement is submitted on behalf of The Business Roundtable in support of The Foreign Trade Antitrust Improvements Act of 1985 (S. 397).

The Business Roundtable is an association of about 200 chief executive officers of substantial companies that are widely dispersed by geographic location and by category of business. The Roundtable was founded in 1972 in the belief that business executives should take an increased role in the continuing debates about public policy.

The companies represented in the Roundtable are substantial consumers of goods and services and they also do business in a highly competitive marketplace. They therefore have a vital interest in effective enforcement of the antitrust laws. Like any other American citizen, business leaders also have a strong interest in promoting international trade and improving the worldwide competitiveness of American enterprises.

Many, if not most, of the Business Roundtable members are chief executives of companies that have branches or subsidiaries in foreign countries. As such, they also are concerned about foreign attitudes toward American business and the American legal system. These various concerns cause The Business Roundtable to support S. 397, The Foreign Trade Antitrust Improvements Act of 1985.

We recognize that extensive comments on an earlier version of this legislation have already been submitted and that others will submit statements in support of this bill. Accordingly, we will not burden the record with a repetitious description of the bill or of the legal developments which have prompted and shaped it. Rather, we will focus on those policy considerations which are of particular concern to the members of The Business Roundtable.

The Reasons for Roundtable Support

In recent years there has been a growing concern over U.S. international trade deficits and the competitiveness of U.S. business in worldwide markets. It is widely recognized that businesses have to become more efficient in order to compete effectively and efficiency can sometimes be improved if companies are permitted to collaborate in certain areas--and thereby achieve economies of scale and avoid wasteful duplication. Collaboration, however, can raise antitrust concerns and useful collaborative efforts may have been inhibited by real or perceived antitrust problems.

Twice in recent years, Congress has acted to alleviate these antitrust concerns. The Export Trading Company Act of 1982 1/ clarified the jurisdictional reach of the antitrust laws to make it clear that they did not cover activities that solely affected export trade and it also provided a procedure whereby companies intending to engage in export trade could have their proposed conduct certified in advance by the Commerce Department to qualify for a measure of antitrust immunity. The National Cooperative Research Act of 1984 2/ made it clear that joint research ventures were to be judged under a rule of reason and provided that only single, rather than treble, damages could be recovered in antitrust actions brought against ventures that had been notified to the U.S. antitrust agencies. The Act does not explicitly single out international ventures for special attention, but the legislative history makes it clear that Congress intended to improve the U.S. international trade position.

One potential problem area in international antitrust was not addressed by either of these bills. The antitrust laws

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1/ 15 U.S.C. §§ 6a, 45a, 4001-21; various other sections.

2/ 15 U.S.C. §§ 15, 26, 4301-05.

still apply if challenged conduct is shown to have an effect on import trade of the United States. If this effect is present, it means that foreign entities, whether or not related to a U.S. parent, are potentially subject to U.S. antitrust law, even though they have conducted all of their activities in a foreign country and even though the activities are entirely legal--and perhaps even encouraged--in that foreign country.

As earlier testimony has described in detail, this potential liability--particularly the liability to private parties--has created considerable resentment in friendly foreign countries which have entirely different antitrust philosophies. 3/ This conflict can have a significant foreign relations impact which government witnesses are perhaps best qualified to address (although they concern Roundtable members like any other U.S. citizens). The conflict also can have a direct impact on American business operating abroad, however, and that is something which business representatives should address.

There are two distinct effects which are a source of business concern. The first is the very real risk that a business operating overseas will be caught in the crossfire

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3/ To date, laws designed to frustrate the extraterritorial reach of the U.S. antitrust laws have been passed in Australia, Canada, France, the Netherlands, New Zealand, South Africa, Switzerland and the United Kingdom.

between the conflicting competition policies of governments. This is not a startling or exotic phenomenon. Something similar can happen right here in this country when a sovereign State decides to substitute regulation for competition in certain areas of endeavor, and there is ongoing litigation over the extent to which State regulation can immunize conduct that conflicts with federal antitrust standards. 4/ The policy considerations may be quite different, of course, when there is a conflict between purely domestic jurisdictions, but the analogy is useful. The point is that U.S. antitrust standards and remedies are not uniformly based on immutable principles of natural law which all civilized jurisdictions may be expected to accept; that it is appropriate for U.S. courts to recognize that there can be legitimate differences of opinion between governments about competition policy; that a business enterprise which operates in multiple jurisdictions can quite innocently be trapped in a dilemma; and that there are situations when the U.S. antitrust laws should not be given their fullest extraterritorial reach.

There are recognized doctrines, such as the "act-of-state" or the "sovereign compulsion" defense, which can

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4/ The extent of this litigation may be appreciated by searching the judicial citations of Parker v. Brown, 317 U.S. 341 (1943).

sometimes mitigate this problem and some courts have already gone further and applied a "jurisdictional rule-of-reason" analysis which is endorsed by S. 397. Other courts have held that such an analysis is inappropriate, 5/ however, and the potential for international conflicts persists. The Roundtable endorses the judgment of the bill's sponsor and its other supporters that Congressional action is required.

Attention to the conflict over antitrust could also alleviate a second source of business concern. Foreign hostility to certain extraterritorial applications of U.S. antitrust laws may tend to foster a corresponding hostility to the affiliates of U.S. companies which operate in these foreign countries. This hostility may affect the international operations of American business in ways that have nothing to do with antitrust. The nexus cannot be demonstrated with precision, of course, but there is good reason to believe that Congressional recognition of these problems in the antitrust area will have a favorable spillover impact on the general business climate which American firms encounter abroad. This is obviously a matter of interest to the members of The Business Roundtable.

5/ See Laker Airways v. Sabena, Belgium World Airlines, 731 F. 2d 909 (D.C. Cir. 1984).

Comments on the Legislation

When Senator DeConcini offered the present bill, he stated that "the revised bill I introduce today is a better bill, not just a compromise." We agree. The constructive comments offered during the June hearings--particularly those of the Department of Justice and the Department of State--have been heeded and the result is a superior bill which should command widespread support. The following discussion will highlight some significant changes.

(a) The Jurisdictional Rule of Reason

Both Departments expressed concern about the intrusion of courts in delicate areas of foreign policy. The revised bill accommodates this concern by setting forth in Section 3 the kinds of factors which courts are to consider when applying a "jurisdictional rule of reason" and by providing that dismissal is mandatory if the Attorney General certifies that "the action will interfere with the conduct of the foreign relations of the United States."

It will not necessarily be easy to weigh the rule-of-reason factors, but they basically call for quantitative judgments, not political ones. Courts have experience in judgments of this kind. Judicial determination of a "center of gravity," which may establish the law to apply to a contract, for example, involves consideration of similar factors. Moreover, as mentioned above, application of the "state action" doctrine of Parker v. Brown is an analogous task. The range of discretion may seem extensive at the beginning, but in time precedential rules may provide more extensive guidance to the courts. Even if there is some initial judicial apprehension over a potentially difficult challenge, that seems preferable to total frustration over an inability to terminate or circumscribe litigation which may raise international tension and be ultimately futile.

(b) The Single Damage Alternative

It has also been suggested that it is inappropriate to authorize a single-damage antitrust remedy in S. 397 because (1) international antitrust cases have often involved cartel-like behavior, which is *per se* illegal under U.S. antitrust law, and because (2) the whole subject of treble damage remedies is currently under study. The changes in the new bill are directly responsive to the first of these concerns. In applying the "detrebling" alternative of Section 5, the courts are now specifically directed to consider the "nature of the violation claimed" in evaluating "the antitrust enforcement interest of the United States."

It would be helpful if the legislative history amplified this language. Presumably, the evaluation involves more than a mere determination of whether the claimed conduct would be per se illegal in a domestic conduct. Foreign jurisdictions may have competitive policies that conflict with our per se rules and the dilemma of a corporation caught in the middle is no less real. The issue should be whether the defendants really had reason to believe that their conduct was proper, or even required, under the laws of the jurisdictions primarily affected or whether, to the contrary, the defendants had some hidden agenda that transcended the foreign competitive policies on which they rely. In the latter case, treble damage exposure would be appropriate, not only because the conduct was culpable, but also because it is necessary to compensate for the risk of non-discovery.

We agree with the judgment that it is undesirable to wait for an overall review of treble damages, in order to deal with the situation which S. 397 addresses. The argument applied with the same force to last year's National Cooperative Research Act, 6/ but Congress wisely decided to proceed. Broadscale treble damage reform is bound to be more controversial than S. 397, and it is not sensible to defer changes which are indicated now just because greater changes may be indicated in the future.

6/ The Justice Department initially advocated more sweeping changes in the treble damage remedy when that Act was under consideration, but ultimately supported the bill as passed.

The single-damage alternative which the bill provides may be more significant in practice than the provision for outright dismissals. Treble damage recovery is a totally alien concept in foreign jurisdictions. Even commentators who are generally skeptical about the need for sweeping changes in the treble-damage remedy are sensitive to the problems caused by foreign hostility to U.S. antitrust policies. A special Report on the treble-damage remedy, prepared last year for the House Judiciary Committee, concluded: 7/

> "A statutory change that would limit private recoveries to actual damages under those circumstances could further defuse potential conflicts, while not unduly jeopardizing American business and consumer interests."

Interestingly, the Report also noted that antitrust plaintiffs "may find a comity analysis more often tipping in their favor if the judiciary were not compelled to impose punitive damages in every case."

(c) Equal Treatment for All Defendants

Finally, we would like to commend the new bill's response to the expressed concern that S. 397 might favor foreign companies at the expense of American co-defendants. It

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7/ Garvey, Report to House Judiciary Committee on Study of Antitrust Treble Damage Remedy, 46 Antitrust & Trade Reg. Rep. (BNA) 356, 368 (Mar. 1, 1984).

would be unfair if a "rule of reason" inquiry weighed common conduct by different standards simply on the basis of nationality. It would be intolerable if the American defendants, under principles of joint-and-several liability, had to pay damages on behalf of equally culpable foreign defendants who had been excused. 8/ The new bill responds to these concerns by providing that a dismissal of the action under Section 3 shall apply to "all parties."

Conclusion

S. 397 presents Congress with an opportunity to address a problem in the international antitrust field that remains after the passage of The Export Trading Company Act of 1982 and The National Cooperative Research Act of 1984. The Roundtable does not claim that the passage of this bill, along with the two others, will solve all U.S. international trade problems, nor does it claim that the passage of this bill will solve all the remaining problems that exist with the U.S. antitrust laws. Moreover, it is clear that the bill will actually be applied only in the exceptional, not the everyday situation. For reasons stated above, however, the bill could

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8/ Passage of S. 1300, which provides for individual treble-damage liability, would eliminate this particular anomoly, of course, but equal treatment of domestic and foreign defendants is still desirable.

have a beneficial effect that extends far beyond its application in litigation. It eases business concern about the conflicting competition policies of different jurisdictions and it sends a signal of accommodation to foreign governments which should improve the general climate for American firms. The Business Roundtable supports S. 397 and recommends favorable consideration by the Congress.

The CHAIRMAN. Thank you.

Mr. Rein, we will be glad to hear from you now.

STATEMENT OF BERT W. REIN

Mr. REIN. Thank you, Senator. I am Bert Rein and I am a member of the firm of Wiley & Rein, I am here on behalf of the U.S. Chamber of Commerce.

The chamber, subject to certain details which are spelled out in our written testimony, supports S. 397, as amended by Senator DeConcini. The bill, S. 397, addresses the difficult issues which arise when U.S. antitrust law, applied extraterritorially, and foreign competition law or policy are both potentially applicable to the same business conduct.

The chamber supports reasonable and predictable application of competition policy to market behavior and it is concerned about international comity as are many other business groups. Therefore, the chamber believes that active consideration of this bill would be a step toward constructive reform of the application of U.S. antitrust laws to international trade.

The principal focus of the chamber's study of this bill has been its impact on American business. American businesses exporting to or operating within foreign markets should not, in our view, be subjected to U.S. antitrust laws which discriminate against them in the market or the courts.

For example, if foreign law and policy permit sellers and buyers to develop product standards jointly for local sales, American firms may hesitate to join with their foreign rivals in such efforts for fear of being charged with exclusion of actual or potential competition from other U.S. exporters.

Similarly, American firms may be deterred by concerns over U.S. antitrust liability from participation in foreign joint ventures or foreign government-condoned allocations of natural resource rights which potentially affect exports to the United States.

We recognize that, in theory, foreign firms would be subject to the same antitrust risks for the same conduct as U.S. firms. But, in fact, foreign governments have protected their firms through diplomatic channels, blocking of antitrust discovery, passage of clawback legislation, and other efforts to limit U.S. antitrust actions against foreign nationals.

Because of these substantive and procedural barriers which favor foreign firms, American business may well be the primary target for extraterritorial antitrust action, as well as a possible target for foreign government retaliation if foreign nationals are sued.

We understand that Congress revised the laws in 1982 to limit actions extraterritorially to those which had a direct, substantial, and reasonably foreseeable effect on U.S. commerce. We certainly support that action, and we believe that action demonstrates that the United States intends to apply its antitrust laws only where there is a substantial U.S. interest in their application.

We would hope that, over time, judicial decisions on this standard would help American firms to be able to predict when this application would take place and when matters would be deemed to be largely within foreign control. We would also hope that this would ameliorate some of our difficulties with foreign governments.

However, the 1982 legislation is not a complete solution to the problems created for American business and U.S. foreign relations by extraterritorial antitrust jurisdiction. There are some kinds of market activity which do have the requisite effect on U.S. commerce, but also have an equal or greater effect on the interests of another sovereign State.

For example, the product standards we discussed which could be set abroad might involve primarily foreign parties and have a principal impact in a foreign market. At the same time, they may meet the 1982 test through their foreseeable effect on exports to the United States.

Similarly, and we have had a recent case in this regard, agreements affecting transportation between the United States and a foreign nation may have an equally direct, substantial and foreseeable impact on the interests of both countries.

In such circumstances, unrestricted enforcement of U.S. antitrust law can subject businesses to potentially conflicting competition policy directives and touch sensitive foreign policy nerves.

We understand, and we are certainly aware, that in a number of cases the courts have attempted to construct their own balancing test in order to sort out these factors. But we do believe that that matter is still cloudy in the courts and we are not entirely satisfied with the tests developed.

The diversity among the judicially proposed tests leaves considerable uncertainty, which reduces their business planning value. Also, the factual complexity of the balancing test devised by the courts and the linkage between the jurisdictional factors and the merits of the conduct alleged may permit extensive, contentious and burdensome discovery before a judicial rule of reason is applied jurisdictionally.

In cases involving both United States and foreign party defendants, the difficulties of obtaining discovery from foreign parties tend to impose discovery burdens disproportionately on American business.

This combination of uncertainty and burden may leave American business discriminatorily exposed to antitrust strike suits and actions based on conduct outside of the United States and in accordance with foreign law.

Now, S. 397 has a number of helpful suggestions which we support to deal with these problems. Section 2 of that bill would give priority consideration to jurisdictional challenges, and we certainly believe that that would be helpful, although we do not deem that solution necessarily to eliminate discovery since a plaintiff can merge jurisdictional and merit factors for discovery purposes.

We would prefer to see section 2 strengthened even further to place a burden on a plaintiff who complains of acts that took place outside the United States or principally affected the commerce of a foreign nation to provide facts which establish the direct, substantial and reasonably foreseeable effects on U.S. commerce before discovery.

We believe that a plaintiff should not jeopardize the foreign relations interests of the United States in such actions unless he has taken the trouble to discover the relevant jurisdictional facts and not merely to start a fishing expedition through discovery.

Section 3 is the critical section of S. 397 and, as initially proposed, would have required dismissal of antitrust cases where the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action.

Senator DeConcini wisely has modified the bill's central test from that of a balancing of U.S. versus foreign interests to that of the jurisdictional rule of reason. The revised section 3 would now incorporate a listing of various factors which would be considered by the courts in determining whether the jurisdictional rule of reason requires dismissal.

Section 3 also would require a court to invite the Attorney General to present the views of the United States on this balance, and would give so-called rule of reason jurisdictional motions priority status.

Legislative enactment of the judicially developed rule of reason jurisdictional test may help to assure the business community that cases primarily affecting foreign interests are relegated to foreign supervision.

This is particularly likely if the courts are provided executive branch guidance and the Attorney General is judicious in assessing the balance of interest. Expedited consideration of rule of reason jurisdictional motions also may be of some utility, although it is subject to the same limitations discussed in connection with the effects of jurisdictional motions under section 2, mainly that a substantial amount of discovery with high cost may take place before the court can get into a position to rule.

From the perspective of the U.S. business community, S. 397's initial phrasing of the jurisdictional rule of reason test in terms of relative national interest in the action was troublesome.

A foreign sovereign's interest in an antitrust action may be quite limited if the only defendants are U.S. companies and foreign nationals are left as unnamed coconspirators. Courts may be tempted to dismiss such actions against foreign defendants to alleviate foreign concerns, while leaving U.S. defendants at risk.

Indeed, even the Attorney General may be affected more by the short-term intensity of foreign complaints than the longerterm threat to foreign sovereignty of controlling activities of U.S. companies in foreign territory through U.S. antitrust laws.

Thus, as originally phrased, section 3, in our view, posed a risk of discrimination against U.S. business. The proposed revision of S. 397 has met this problem by focusing on the primary jurisdictional impact of the alleged violation rather than the nationality of the alleged violator.

However, the chamber believes that United States and foreign defendants should be treated in the same fashion with respect to conduct which is predominantly foreign in its impact. Thus, we support eliminating nationality as a jurisdictional rule of reason criterion under section 3, notwithstanding its use in case law.

Application of S. 397 in a way which will produce different jurisdictional consequences for United States and foreign defendants for the same alleged conduct would be unacceptable to the U.S. business community.

The proposed revision of S. 397 also contains a new section 3 provision designed to meet the criticism of the administration that the original bill unwisely involved the courts in matters that related to the foreign policy of the United States.

Section 3 now proposes that if the Attorney General certifies to the court that a private foreign antitrust action will interfere with the conduct of the foreign relations of the United States, the court shall dismiss the action as to all parties.

This provision is intended to permit the executive branch to play the decisive role in such cases. We believe that the addition of this provision, which we strongly favor, will protect bona fide foreign policy interests and will provide the United States with additional influence in persuading other governments to enter into bilateral and multilateral agreements encouraging competitive policies and permitting expanded foreign discovery where appropriate.

We have also commented on sections 4 and 5 of the bill. In particular reference to the question of treble damages in section 5, we do support the single damage concept and we believe that this is a distinguishable application from the general problem because treble damages are a particular irritant to U.S. foreign relations and make U.S. antitrust laws appear to be penal and inconsistent with general standards of competition policy applied elsewhere.

We do not believe that the general question of the importance and effect of treble damages should be injected into the debate over the use of treble damages in sensitive foreign applications of the U.S. antitrust laws.

Thank you.

[The statement follows:]

STATEMENT
on
THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT (S.397)
before the
SENATE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Bert Rein
October 15, 1985

I am Bert Rein, a member of the firm of Wiley & Rein, Washington, D.C. This statement is submitted on behalf of the U.S. Chamber of Commerce in support of The Foreign Trade Antitrust Improvements Act of 1985 (S. 397).

The Foreign Trade Antitrust Improvements Act addresses the difficult issues which arise when United States antitrust law, applied extraterritorially, and foreign competition law or policy are both potentially applicable to the same business conduct. Based on its long-standing support for applying reasonable and predictable competition policy to market behavior and its concern for international comity, the Chamber favors active consideration of S. 397 as a step toward constructive reform of the application of U.S. antitrust law to international trade.

American businesses exporting to or operating within foreign markets should not be subjected to United States antitrust laws which discriminate against them in the market or the courts. For example, if foreign law and policy permit sellers and buyers to develop product standards jointly for local sales, American firms may hesitate to join with their foreign rivals in such efforts for fear of being charged with exclusion of actual or potential competition from other U.S. exporters. Similarly, American firms may be deterred by concerns over U.S. antitrust liability from participation in foreign joint ventures or foreign government condoned allocations of natural resource rights which potentially affect exports to the United States.

Theoretically, foreign firms participating in agreements or conduct which would subject an American firm to antitrust liability are subject to the same antitrust risks. Foreign governments, however, have reacted sharply to this subjection and have taken steps including vigorous diplomatic protests, blocking antitrust discovery, authorizing "clawback" of treble damages by foreign defendants and retaliatory regulation, in order to limit U.S. antitrust actions against foreign nationals. Because of these substantive and procedural barriers favoring foreign firms, American business has become a primary target for extraterritorial antitrust actions as well as a possible target for foreign government retaliation when foreign nationals are sued.

Congress revised the antitrust laws in 1982 to limit their extraterritorial reach to actions which had a "direct, substantial and reasonably foreseeable effect" on U.S. commerce. This restriction helps assure foreign governments that the U.S. is not attempting to export antitrust principles for their own sake but rather to protect its legitimate trading interests. Over time, this restriction may also be developed judicially to the point where American business reliably may be able to identify situations where foreign competition law and policy, rather than U.S. antitrust law, will be the governing standard.

The 1982 legislation, however, is not a complete solution to the problems created for American business and U.S. foreign relations by extraterritorial antitrust jurisdiction. Market activity which has a "direct, substantial and reasonably foreseeable effect" on U.S. trade interests may have an equal or even greater effect on the interests of another sovereign with a differing regulatory philosophy. For example, agreed product standards consistent with local law, may be set abroad involving primarily foreign parties and have their principal impact in a foreign market. At the same time, they may foreseeably affect the market for certain U.S. exports so that the 1982 jurisdictional test is met even though the foreign interest in the conduct at issue is predominant. Similarly, agreements affecting transportation between the United States and a foreign nation may have an equally direct, substantial and foreseeable impact on the interests of both countries. In such circumstances, unrestricted enforcement of U.S. antitrust law can subject businesses to potentially conflicting competition policy directives and touch sensitive foreign policy nerves.

Certain U.S. courts have attempted to apply a jurisdictional "rule of reason" to cases involving potentially overlapping national interests. E.g., Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), on remand, 574 F. Supp. 1453 (N.D. Cal. 1983), aff'd, 749 F.2d 1378 (9th Cir. 1984); Industrial Dev. Co. v. Mitsui Co., 671 F.2d 876 (5th Cir. 1982), vacated on other grounds, 103 S. Ct. 1244, aff'd on remand on other grounds, 704 F.2d 785 (5th Cir. 1983); National Bank of Canada v. Interbank Card Association, 666 F.2d 864 (10th Cir. 1981), cert. denied, 455 U.S. 1001 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979). Acceptance of this approach is not universal, however, and its application in the form of a judicial "balancing test" has been rejected recently in an extensive opinion by the District of Columbia Circuit. Laker Airways, Ltd. v. Sabena, 731 F.2d 909, 948 (D.C. Cir. 1984).

Even if an intrest-balancing approach to extraterritorial jurisdiction commended broad judicial acceptance, its utility to the American business community would not be altogether clear. First, the diversity among the judicially-proposed tests leaves considerable uncertainty which reduces their business planning value. Second, the factual complexity of the balancing tests devised by the courts (and the linkage of certain jurisdictional factors with the underlying merits) may permit extensive, contentious and burdensome discovery before the "rule of reason" is applied. Third, in cases involving both U.S. and foreign party defendants, the difficulties of obtaining discovery from foreign parties tend to impose discovery burdens disproportionately on American business. This combination of uncertainty and burden may leave American business discriminatorly exposed to antitrust strike suits when it is acting outside the United States in accordance with foreign law.

S. 397 suggests several ways to ameliorate existing problems in extraterritorial antitrust enforcement. First, Section 2 of S. 397 would require district courts to give priority consideration to challenges to subject matter jurisdiction under the 1982 amendments. Jurisdictional motions would stay, absent good cause shown, all further proceedings pending their resolution except for "such discovery or other proceeding directly related to the motion as the court deems appropriate." Section 2, thus, would give business defendants an opportunity to limit costs and burdens in actions only remotely connected with U.S. interests and would help assure our trading partners that antitrust litigation would not be used to bludgeon their nationals into unwarranted settlements.

Expedited consideration of jurisdictional motions, while commendable, may be of limited practical significance. Plaintiffs inevitably will guard against such motions by alleging effects on U.S. commerce whose substance may be ascertainable only through detailed inquiry into the scope of the agreement or anticompetitive practices alleged, the practical operation of the markets involved and the otherwise availale options for allegedly affected U.S. business and consumers. Given such allegations, the discovery limitations of S. 397 may prove to be more apparent than real, and the utility of separating jurisdictional and merits discovery may be questioned.

As S. 397 is considered further, amendments to strengthen Section 2 should be evaluated carefully. For example, Section 2 could provide that where the moving party establishes that the acts complained of took place outside the United States or principally affected the commerce of a foreign national (a showing which may be apparent from the complaint), the party asserting jurisdiction must provide facts establishing a "direct, substantial and reasonably foreseeable" effect on U.S. commerce. A Section 2 motion should be heard prior to any discovery to make clear that plaintiffs assert extraterritorial jurisdiction should have a substantial factual basis for jurisdiction before an action is commenced. Taken in combination with strengthened Rule 11, Fed. R. Civ. P., this requirement might substantially add to the ability of American business acting abroad to conform its conduct to applicable foreign law and policy. At the same time, this requirement might enhance the international credibility of well-founded antitrust actions actually directed at safeguarding substantial U.S. interests.

Section 3 of S. 397 as initially proposed would have required district courts in antitrust cases and state courts hearing cases under similar State laws to dismiss such cases where "the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action." Senator DeConcini (D-AZ) wisely has modified the bill's central test from that of a balancing of U.S. versus foreign interests to that of the "jurisdictional rule of reason." The revised Section 3 now would incorporate a listing of various "factors" which would be considered by the courts in determining whether the jurisdictional rule of reason requires such dismissal. Section 3 also would require a court to invite the Attorney General to present the views of the United States on this balance and would give so-called "rule of reason" jurisdictional motions priority status. All other proceedings also would be stayed pending determination of such motions.

Legislative enactment of the judicially developed "rule of reason" jurisdictional test may help to assure the business community that cases primarily affecting foreign interests are relegated to foreign supervision. This is particularly likely if the courts are provided Executive Branch guidance and the Attorney General is judicious in assessing the balance of interests. Expedited consideration of "rule of reason" jurisdictional motions also may be of some utility although it is subject to the same limitations (and potential strengthening) discussed in connection with "effects" jurisdictional motions under Section 2 of S. 397.

From the perspective of the U.S. business community S. 397's initial phrasing of the jurisdictional "rule of reason" test in terms of relative national interests in the "action" was troublesome. A foreign sovereign's interest in an antitrust action may be quite limited if the only defendants are U.S. companies and foreign nationals are left as unnamed coconspirators. Courts, thus, may be tempted to dismiss such actions against foreign defendants to alleviate foreign concerns while leaving U.S. defendants at risk. Indeed, even the Attorney General may be affected more by the short-term intensity of foreign remonstrance against risk to foreing nationals than the longer-term threat to foreign sovereignty of controlling activities of U.S. companies in foreign territory through U.S. antitrust laws. Thus, as originally phrased, Section 3 of S. 397 posed a risk of discrimination against U.S. business.

The proposed revision of S. 397 has met this problem by focusing on the primary jurisdictional impact of the alleged violation rather than the nationality of the alleged violators. However, the Chamber believes that U.S. and foreign defendants should be treated in the same fashion with respect to conduct which is predominantly foreign in its impact. Thus we support eliminating nationality as a jurisdictional "rule of reason" criterion under Section 3, notwithstanding its use in case law. Application of S. 397 in a way which would produce different jurisdictional consequences for U.S. and foreign defendants for the same alleged conduct would be unacceptable to the U.S. business community.

The proposed revision of S. 397 also contains a new Sectin 3 provision designed to meet the criticism of the Administration, that the original bill unwisely involved the courts in matters that related to the foreign policy of the United States, a province that is more appropriately reserved for the Executive Branch. Sectio 3 now proposes that if the Attorney General certifies to the court that a private foreign antitrust action "will interfere with the conduct of the foreign relations of the United States," the Court shall dismiss the action "as to all parties." This provision is intended to permit the Executive Branch to "play the decisive role in such cases." We believe that the addition of this provision, which we strongly favor, will protect bona fide foreign policy interests and will provide the United States with additional influence in persuading other governments to enter into bilateral and multilateral agreements encouraging competitve policies and permitting expanded foreign discovery where appropriate.

Section 4 of S. 397 would permit the doctrine of forum non conveniens to be applied in antitrust cases involving U.S. foreign commerce. Presumably, this section would permit an action which survived both "effects" and "rule of reason" jurisdictional challenges to be dismissed in favor of foreign litigation for the convenience of parties and witnesses. Senator DeConcini's introductory statement of S. 397 suggests that Section 4 is aimed primarily at "forum shopping foreign antitrust plaintiffs." Cong. Rec. (Feb. 6, 1985). As S. 397 is considered further, alternative means for dealing with such plaintiffs, including a requirement for reciprocal remedial access to foreign courts by U.S. plaintiffs, should be evaluated. In any event we beleive that forum non conveniens may take on added significance in connection with the detrebling relief proposed under Section 5.

Section 5 of S. 397, as now proposed, would permit district courts and state courts hearing state antitrust cases to limit plaintiffs to recovery of single damages and reasonable attorneys' fees in foreign commerce cases if two additional test are met. Single damages would obtain where the court determines both that the exercise of jurisdiction over the claim would be more consistent with the jurisdictional rule of reason and that the antitrust enforcement interest of the United States would not be substantially impaired if the claim were limited to actual damages or total damages as provided herein. Recognizing the intense concern of foreign sovereigns with the "punitive" element of private treble damage actions, Section 5 would give courts an additional ameliorative option where U.S. and foreign interests appear closely balanced. At the same time, the court is required to consider such relevant factors as the nature of the violation claimed and other elements affecting the antitrust enforcement interest of the United States.

Limiting plaintiffs to single damages in foreign commerce antitrust cases when defendants had a good faith reason to believe that their actions were in conformity with controlling foreign law seems sensible and consistent with the general principle that punitive deterrence is inappropriate absent willful misconduct. A single damage proceeding also appears more compatible with foreign business tort concepts. The proposed revision of Section 5 seems to have struck the proper balance between jurisdictional reasonableness and antitrust enforcement interests. As such, it provides a useful further tool for the judicial arsenal to deal with these difficult cases.

As now proposed, S. 397 deals with important business issues and offers a number of creative and useful suggestions for their resolution. The Chamber supports prompt and favorable consideration of revised S. 397, together with our additional proposals.

The **Chairman**. I want to ask a couple of questions and both of you can answer them.

This bill would seem to permit the dismissal of a plaintiff's valid claim for antitrust injury on grounds that have little to do with the merits of the suit but have more to do with general interests somewhat unrelated to the plaintiff's rights.

Can you point out any analogies or any other legal context in which meritorious private lawsuits are dismissed because of broad considerations not related to the merits of the suits?

Mr. **Leary**. Mr. Chairman, I think the use of the term "meritorious" makes it rather difficult to answer the question because of the connotation that somehow or other there is a mere procedural impediment here that is interfering with someone's right to recover.

The fact of the matter is the analogy I gave in my statement to the State action doctrine is a very good one. There are cases where plaintiffs have brought suit challenging conduct that would violate federal antitrust law, which have been dismissed on the ground that a sovereign State has chosen to regulate that activity in another way and that, therefore, the plaintiff cannot recover for that conduct.

That is a very close analogy to the kind of a situation which you are presented with here. What this bill contemplates is there may be some situations where notwithstanding the fact that there is an adequate jurisdictional nexus under the 1982 Improvements Act, and notwithstanding the fact that there is conduct that may have violated U.S. antitrust standards, the court determines that the conduct took place under circumstances where the parties had reason to believe that they were in accord with the laws of the jurisdiction that was primarily concerned—and that therefore the case ought to be dismissed or, at the very least, damages ought to be detrebled.

So I guess our point, Mr. Chairman, is that this is not an exotic or unprecedented type of situation.

Mr. **Rein**. Senator, with all deference, I think that question may confuse the laws of God with the laws of man in this sense: An action that may be meritorious under the antitrust laws, because the conduct which is questioned appears to be a violation of a standard laid down by the United States, may be viewed quite differently from the perspective of another sovereign's laws which equally reach that conduct.

Another sovereign may view that conduct as not only free from liability, but encouraged and supported by government. So what you have is really a problem of choice of law, and choice of law and conflict of law problems are garden variety and come up every day in courts.

The reason they are fought about is that the differing legal standards will produce different outcomes for the same conduct. What we are facing here is a series of problems in which one sovereign that has a substantial interest in the conduct views it one way and another sovereign views that same conduct another way.

Unless we are to assert that the antitrust laws are paramount in some sense to the wisdom of other governments, then we have to reach an accommodation. We understand this bill as a whole as a means of reaching accommodations in substance, saying to other governments, basically what we are going to try to do is figure out where your interests are paramount and where ours are paramount.

Where ours are paramount, we will apply our laws. Where yours are paramount, we will apply your laws, and that may mean that we will dismiss these actions. That does not oust the plaintiff; he may go to a foreign court and seek to remedy his wrong under their law if he believes there is a violation. He may seek an alternative remedy in the U.S. courts in which choice of law principles can be invoked.

But we do not deem that to be in any way remarkable or unusual because the clash is not a clash of procedure. It is a clash of which law properly applies to the conduct at issue, and that is why the friction arises. If this were simply procedure, you would not have the emotion, you would not have the foreign relations impact.

What we are really faced with is complex conduct that affects two sovereigns who view that conduct quite differently and attach different consequences to it and we are trying to get a harmonious resolution.

The CHAIRMAN. The Justice Department expressed concern that this bill might allow courts to limit damages to single damages rather than treble damages on a case-by-case basis that produces uneven results for similar kinds of conduct.

The Justice Department also pointed out that the detrebling provision would favor foreign firms over American firms. Would the revised bill address these problems?

Mr. LEARY. We believe, Mr. Chairman, that the revised bill has taken account of the Justice Department objections in very significant measure. Section 5 has been revised to specifically provide that the court should weigh in deciding whether or not to detreble not only these foreign interest factors or this jurisdictional balancing that we have discussed in response to the previous question, but also specifically the interests of the United States in antitrust enforcement.

Section 5 dealing with that detrebling alternative has outlined an additional number of factors that should be weighed in making that decision, including the nature of the conduct at issue, the likely effect of that conduct or the likely effect of detrebling on the ability of the plaintiff to sustain the action, the pendancy of other proceedings, and whether or not there are other plaintiffs.

So we believe, Mr. Chairman, that this bill has gone a long way toward satisfying the objections that the Department of Justice raised initially. The additional objection which they raised that I alluded to in my opening remarks was that this whole subject should be deferred, pending the consideration of the Georgetown study, and I tried to respond to that criticism.

I might also say that when the joint venture bill was being considered by the Congress just one year ago, the initial position of the Department of Justice was that it was inappropriate to have a narrow attention to the treble damage remedy and that a much broader attention to treble damages was warranted.

The Department of Justice subsequently modified its position and supported the joint venture bill that was passed last year. Maybe I am an optimist, but I have high hopes that the Department of Justice may modify its position and support this bill as well.

Mr. REIN. Mr. Chairman, certainly the members of the chamber shared the concern of the Justice Department about the possibility that in the same case some defendants would be subject to treble damages—namely, U.S. defendants—while other defendants were subject to single damages.

We believe that the revisions to the bill have made clear that that was not intended. We would certainly want the legislative history as well to emphasize that the same damage provisions in any single case should be applicable to United States and to foreign defendants.

With respect to the problem that different courts may reach different results so that you do not have a necessarily uniform application of single damages, there is always a tradeoff between some flexibility in deciding how to shape the law and the uniformity of result. We think that that has been acceptably resolved by section 5 of the bill.

The CHAIRMAN. Anything else either one of you would like to say?

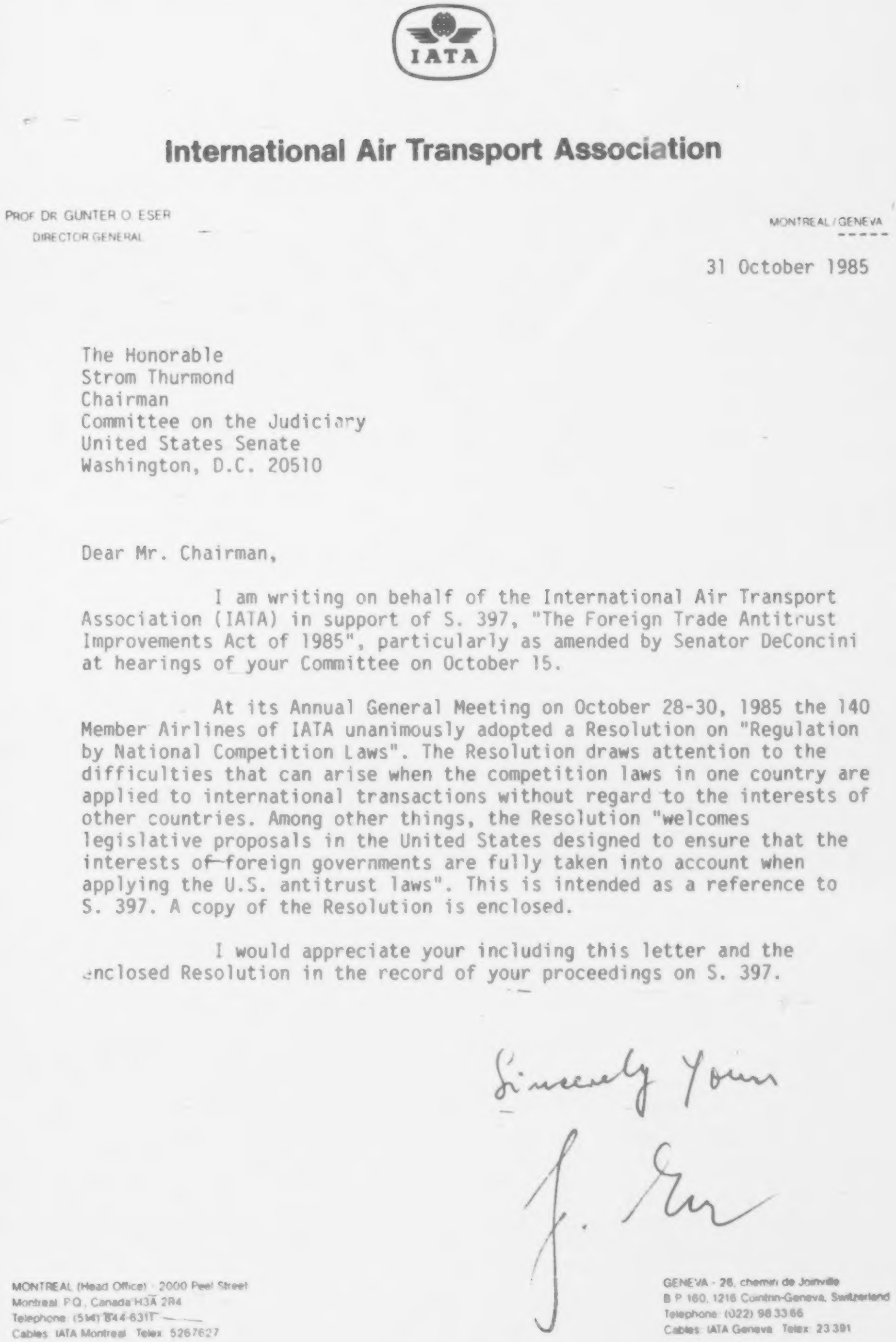
Mr. LEARY. That is all. Thank you, Mr. Chairman.

Mr. REIN. Thank you, Mr. Chairman.

The CHAIRMAN. We stand adjourned.

[Whereupon, at 10:47 a.m., the committee was adjourned.]

APPENDIX



IATA

International Air Transport Association

PROF DR GUNTER O. ESER
DIRECTOR GENERAL

MONTREAL / GENEVA

31 October 1985

The Honorable
Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman,

I am writing on behalf of the International Air Transport Association (IATA) in support of S. 397, "The Foreign Trade Antitrust Improvements Act of 1985", particularly as amended by Senator DeConcini at hearings of your Committee on October 15.

At its Annual General Meeting on October 28-30, 1985 the 140 Member Airlines of IATA unanimously adopted a Resolution on "Regulation by National Competition Laws". The Resolution draws attention to the difficulties that can arise when the competition laws in one country are applied to international transactions without regard to the interests of other countries. Among other things, the Resolution "welcomes legislative proposals in the United States designed to ensure that the interests of foreign governments are fully taken into account when applying the U.S. antitrust laws". This is intended as a reference to S. 397. A copy of the Resolution is enclosed.

I would appreciate your including this letter and the enclosed Resolution in the record of your proceedings on S. 397.

Sincerely Yours

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41st ANNUAL GENERAL MEETING

INTERNATIONAL AIR TRANSPORT ASSOCIATION

Hamburg, 28-30 October 1985

Extract from

FINAL RESOLUTIONS

II. REGULATION BY NATIONAL COMPETITION LAWS

WHEREAS the 39th Annual General Meeting drew attention to the need to ensure that domestic policies and legislation are not applied to international air transport without taking due account of its special characteristics - particularly the existing air transport regulatory framework and the cooperative activities of airlines in the public interest;

WHEREAS the 24th Assembly of ICAO requested States to avoid unilateral measures which may affect the orderly and harmonious development of international air transport and initiated a study on the impact of national competition laws on international air transport regulation;

WHEREAS the application of national competition laws is increasing as States extend existing laws or introduce new legislation to cover international air transport;

WHEREAS the application of national competition laws duplicates and conflicts with the aviation competition regime established through government bilateral and multilateral air transport agreements;

WHEREAS conflicting regulation can lead to disruption of the international aviation system, serious operational or financial problems for international airlines and inconvenience for travellers and shippers;

THE 41ST ANNUAL GENERAL MEETING

Urges States to:

- Consider the serious problems created for the international air transport system when additional regulation occurs through application of national competition laws;
- Recognise the special features of international aviation when considering the application of national competition laws to international air transport. Take into account the principle of comity in resolution of intergovernmental differences arising from application of national competition laws to international air transport.
- Welcomes legislative proposals in the U.S. designed to ensure that the interests of other governments are fully taken into account when applying U.S. antitrust laws.
- Requests ICAO to take urgent steps to develop international guidelines and model bilateral clauses on the application of national competition laws to international air transport.

Statement of
The National Foreign Trade Council

In Support of S.397
Submitted to the
Senate Committee on the Judiciary

The National Foreign Trade Council is a private, non-profit-organization with a membership of more than 550 U.S. companies engaged in international business. Since 1914, when it was established, the Council's aim has been to promote the expansion of American trade and investment. To this end the Council has advocated an open international economy and the reduction of barriers to trade and investment.

In this context, U. S. antitrust laws play several roles. Domestically, the Sherman and Clayton Acts have fostered free and vigorous competition in the U. S. market, strengthening the ability of American companies to compete in international markets. Moreover, these laws have prevented foreign companies from engaging in anti-competitive activities in the U.S. market to the detriment of American consumers and producers. The application of U. S. antitrust laws to conduct outside the United States, on the other hand, has not always enhanced U.S. economic interests, or improved the competitive environment for U. S. companies having foreign subsidiaries or foreign operations.

The purpose of the hearings is to solicit views on S.397, the proposed Foreign Trade Antitrust Improvements Act, introduced by Senator Dennis De Concini who has since proposed certain revisions in the bill. Except as indicated below, the National Foreign Trade Council supports the bill in its proposed revised form.

The Provisions of S.397

The bill as revised would amend the Sherman Act and the Clayton Act to modify their application to U. S. foreign trade and commerce. The legislation consists of four principal sections, all but one of them directed exclusively toward private antitrust lawsuits rather than toward governmental enforcement actions:

(1) Sections 2 and 3 of the bill would encourage the courts, in actions under the antitrust laws, to hear and determine motions to dismiss for lack of subject matter jurisdiction as a preliminary matter after discovery and other procedures directly related to such motion, before other proceedings are permitted.

(2) In private antitrust suits, Section 3 provides that the courts shall dismiss such actions "whenever it determines that the jurisdictional rule of reason requires such dismissal," an attempted codification of the Timberlane* rule. The original version of S.397 which was introduced on February 6 by Senator DeConcini provided that the test for dismissal under Section 3 should be determined by "balancing": whether "the interests of the U.S. served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action." In the hearings held by the Senate Judiciary Committee on June 21, the Administration criticized this provision for involving the courts in the resolution of foreign policy questions which were better left to the Executive Branch. The revised bill meets this criticism in part by modifying the bill's central test from that of adverse effect on the interests of foreign nations to the standard of jurisdictional reasonableness.

(3) Under Section 4, the doctrine of forum non conveniens would apply in private foreign antitrust suits.

(4) Section 5 would give a U. S. court the discretion to permit a private antitrust claim resulting from foreign trade or commerce to go forward as a suit for single, rather than treble, damages if doing so "would be more consistent with the jurisdictional rule of reason".

Problems from Jurisdictional Conflicts

In recent years, as international trade and investment have grown, there have been many instances of conflict between national regulatory regimes. In no area has the conflict been more marked than in the field of antitrust regulation, where the differences in attitude have been most extreme - between those countries (represented by the United States) with expansionist traditions in both the extraterritorial application of their law and methods of trial discovery and other nations with differing values and practices. The conflict has led, on the one hand, to the growth of blocking or retaliatory statutes, prohibiting or punishing international discovery or relief, and, on the other hand, to attempts to moderate and ease the conflicting assertions of jurisdiction by international agreement and the use of "balancing of interests" tests.

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* 549 F.2d.597 (9th Cir. 1976).

The recent Laker litigation* is a particularly good example of the conflicts that arise between countries with similar legal systems and traditions but differing attitudes toward private antitrust suits. The litigation involved two separate series of lawsuits, in the United States and in the United Kingdom. Injunctions and counterinjunctions characterized both series of suits. In a statement to the amicus curiae, the British Government noted:

> "In the view of Her Majesty's Government, a determination by the courts of the United States that tariffs charged by Laker's competitors, as judged to be appropriate by the British authorities, were predatory in their effect on Laker (that is to say caused the demise of Laker) would be a direct challenge to the decisions and requirements of the British authorities."

Foreign reaction to such assertions of United States regulatory jurisdiction has included the blocking of discovery and retaliatory measures, including "clawback" or other statutes designed to frustrate foreign judgments. Much of the recent blocking or retaliatory legislation has been adopted with the express purpose of frustrating the application of the United States antitrust laws with their accompanying procedures for discovery and private treble-damage actions against nationals of foreign countries.

Impact on American Business

U. S. businesses which do business abroad experience many difficulties from the extraterritorial assertion of U. S. antitrust jurisdiction over matters that are primarily foreign in their nature. American businesses are adversely affected in their foreign operations by the hostility and resentment toward American interests which are engendered by such regulatory intrusions. Foreign regulatory authorities and foreign governments routinely express their annoyance toward what they regard as unwarranted interferences with their sovereignty and authority. The reports on S.397 submitted to this Committee by the Section on Antitrust Law and International Law and Practice of the American Bar Association amply document the many past instances of such protests.

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* See e.g.731 F.2d. 909 (D.C. Cir.1984).

In addition to the inherent prejudice to U. S. business interests involved in the creation of such irritants, application of U. S. antitrust laws to the foreign conduct of U.S. owned foreign subsidiaries exposes both those subsidiaries and their U. S. parents to the risk of being caught between conflicting requirements imposed by two or more authorities. This situation provides a further justification for the legislation now proposed: that of fairness and the wish to avoid subjecting U. S. foreign subsidiaries to the conflicting demands of two or more sovereigns. U. S. antitrust law has developed various doctrines or defenses such as that of comity, the act of state doctrine and the foreign government compulsion defense, to moderate the exercise of jurisdiction by the courts in situations where conflicts may arise. One consistent strand or theme through all of these doctrines is that of the conflict of laws process of weighing the respective claims of jurisdiction. This process would be strengthened by the adoption of the proposed bill.

There are further U. S. business interests in seeking a solution to the problems arising from application of U. S. antitrust laws to foreign conduct. U. S. companies are sometimes named as defendants in private antitrust actions in order to state a colorable claim of conspiracy with foreign companies also named as defendants or co-conspirators but less vulnerable because of their foreign situs. If it were recognized that conduct which is predominantly foreign did not provide a basis for U.S. private antitrust suits,U S. business would be less open to this form of attack. Finally, notwithstanding the passage of the 1982 Antitrust Improvements Act stating that conduct affecting only foreign interests was outside the scope of the antitrust laws, it is believed that many U. S. companies still are deterred from entering into foreign trade transactions in part because of their uncertainty over the coverage of U. S. antitrust law.

Reasons for National Foreign Trade Council Support

The National Foreign Trade Council believes that the provisions of S. 397 would assist American business doing business abroad in the following ways:

(a) It would provide a variety of measures to mitigate or avoid the resentments and irritations caused by the private antitrust suits attacking predominantly foreign conduct and adversely affecting the interests of U.S. companies doing business abroad. The passage of the bill would reduce much of the discord which such suits have created for U.S. interests abroad.

(b) Most important, U. S. business interests and U. S. foreign trade would be directly aided through the bill's application to the activities of U. S.companies and foreign subsidiaries abroad. Senator DeConcini's introductory statement last February noted:

> "The U. S. corporation doing business abroad must also have some reassurance that it will not become caught in between the sometimes in consistent regulatory responsibilities of governments. Even if a foreign government does not affirmatively require a U. S. corporation to do business in a way that could pose antitrust problems, the foreign government may well condone and encourage cooperative practices among com-petitors that the U. S. corporation ignores at its own business peril in the foreign market".

A number of business groups expressed their concern that the original standard of adverse effect on "the interests of foreign nations" could lead to discrimination in favor of foreign corporations over U.S. companies in the application of the bill's provisions. Senator DeConcini's statement accompanying his proposed revised bill notes:

> "The language of both Sections 3 and 5 has been clarified to remove any possible doubt about the equal applicability of these sections to U.S. as well as foreign defendants. If an action is to be dismissed for interference with predominant foreign national interests, it is to be dismissed as to all defendants, U.S. as well as foreign. If the action is to be limited to single damages, it is to be so limited as to all defendants, U. S. as well as foreign. That was, I submit, the clear purport of the original text of the bill, but I am happy to put the question entirely to rest in this revision".

The legislative history of the bill thus would clearly reflect the codification by the bill of the jurisdictional rule of reason on a non-discriminatory basis, for the overseas conduct of both U. S. and foreign corporations.

The National Foreign Trade Council endorses and supports the application of the "balancing" process to private antitrust suits involving predominantly foreign conduct, as provided under Section 3 of the bill. We note the following:

(1) Section 3 of the revised bill articulates the appropriate outlines of the "balancing" test, and the record should clearly reflect the scope and extent of the considerations involved in the "balancing" process, as reflected, *e.g.*, in such opinions as *Timberlane* and *Mannington*, Section 40 of the *Restatement, Foreign Relations Law (Second)* and proposed Section 403 of the *Restatement (Revised)*. The legislative intent is clear, and the list of factors to be considered should be clearly enunciated in the legislative history.

At the same time, the legislative history should emphasize that the "balancing" process will consider and fully weigh U.S. business and consumer interests. Effects on U.S. exports or imports of either the conduct challenged by the lawsuit or the lawsuit itself must be given full consideration by the court.

(2) The bill provides that the court "shall" dismiss actions under Section 3(a). Obviously, such dismissal will only follow the court's making a "determination" under the "balancing" test which process affords a court broad discretion both under this Section and that permitting detrebling. Unless the court makes such a "determination", it need not dismiss the action.

(3) Section 5 (which provides for discretionary detrebling by the court after application of the "balancing" test) has been revised to provide for the discretionary application of de-

trebling where single damages would be more consistent with the jurisdictional rule of reason.

The revised bill attempts to take due account in the detrebling provision of the "antitrust enforcement interest of the United States". In determining the effect of the limitation to actual damages on the antitrust enforcement interest, the court is directed to consider such factors as "the nature of the violation claimed",thus permitting due consideration to be given to the desirability of retaining treble damages where more heinous or deliberately concealed offenses are involved.

(4) To meet the Administration's criticism of the original bill that it placed the courts in a political role, the revised bill has been depoliticized of any foreign policy considerations more appropriately left to the Executive Branch. The revised bill provides that with respect to both Sections 3 and 5 that "the courts shall notify the Attorney-General upon the filing of any such motion and invite the views of the U.S. as to the proper disposition of the motion". The legislative history should indicate that such views will be accorded great weight to the extent that questions of conflict with foreign law or foreign economic policies are involved.

Additionally, Section 3(c) of the revised bill provides that if the Attorney-General certifies to the court that the action will interfere with the conduct of the foreign relations of the U.S., the court shall enter a judgment dismissing the action. Senator DeConcini has noted that this last provision is intended to permit the Executive Branch to "play the decisive role" where political foreign policy considerations dictate that jurisdiction should not be exercised. We are concerned that Section 3(c) may itself pose serious constitutional questions, not because its provision for dismissal disturbs any "vested" rights of potential private antitrust plaintiffs but because its enunciated basis for delegation to the Attorney-General of the power to withdraw the courts'jurisdiction is not sufficiently defined. On balance, we recommend that the dismissal authority remain with the courts but that they be required to invite the views of the Executive Branch which latter shall be accorded great weight.

Conclusion

To summarize, the National Foreign Trade Council believes that the bill would provide several important and useful legislative provisions with respect to international antitrust cases:

1) By codifying the so-called jurisdictional "rule of reason" for private treble damage cases, the bill would insure that such cases do not become vehicles for permitting private litigants to warp U.S. policy involving important national interests.

2) In providing the courts must seek the advice of the Executive Branch on issues involving foreign nations in such cases and by strongly encouraging the Executive Branch both to provide its own comments and to seek those of other governments in such matters, the bill will facilitate the consideration of all pertinent U. S. interests, including those involving foreign nations,in private U.S. actions. As such, it meets the legitimate criticism of those who fear to entrust such balancing to the courts.

3) The provision for judicial discretion to detreble private antitrust awards, where such detrebling would cure significant adverse effects of the action, would make available a useful alternative in some foreign commerce cases to dismissals on jurisdictional grounds. This addition to the judicial arsenal would provide a desirable flexibility for judicial response to the difficult foreign relations issues posed by such cases. Provisions for requiring the courts to seek Executive Branch advice on such matters will enable the latter to deal with any foreign relations matters more suitable for its decision.

For the above reasons, the National Foreign Trade Council believes that the proposed bill will both aid U. S. business in its foreign operations and contribute to improved relations with our allies and national trading partners. We believe that passage of the bill will make a major contribution to the establishment of international trading relations on a fair, stable and coherent basis.

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May 15, 1985

Re: Foreign Trade Antitrust
Improvements Act of 1985
(S. 397)

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510

Attn.: Ken Starling, Esq.
Antitrust Counsel

Dear Senator Thurmond:

In connection with the Foreign Trade Antitrust Improvements Act of 1985 (S. 397), which we understand will be the subject of a hearing before the Senate Judiciary Committee on May 21, 1985, we are enclosing a report prepared by the Committee on Antitrust and Trade Regulation of The Association of the Bar of the City of New York.

For the reasons stated in the report, the Committee believes that the Act would help resolve many of the political tensions which extraterritorial applications of our antitrust laws have engendered. At the same time, the Committee suggests certain modifications in the language of S. 397 which the Committee believes would better further the goals of the legislation.

If there is any further information which our Committee can provide, please do not hesitate to let me know.

Respectfully yours,

Guy Miller Struve

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON ANTITRUST AND TRADE REGULATION

REPORT ON THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1985

S. 397, 99th Cong., 1st Sess. (1985), the Foreign Trade Antitrust Improvements Act of 1985, seeks to ameliorate the economic and political ill effects of private plaintiffs' use of the Sherman Act and Clayton Act beyond our borders. The Committee finds the proposed Act, on balance, worthy of support.

INTRODUCTION

United States antitrust jurisdiction encompasses wholly foreign conduct if such conduct has a direct, substantial, and reasonably foreseeable economic effect within the United States. 15 U.S.C. § 6(a) (1982). Private plaintiffs have used the extraterritoral reach of our antitrust laws to challenge a secret international uranium producers' cartel, international price-fixing by ocean shippers, alleged predatory pricing by trans-Atlantic air carriers, even price-fixing by OPEC and its member states.

Unfortunately, these suits often pose a direct conflict between the jurisdiction of United States courts because of economic effects felt in this country, on the one hand, and the legitimate territorial jurisdiction of foreign nations, on the other. The suits invariably involve expansive offshore pretrial discovery and are frequently criticized by our closest and most valued trading partners as an affront to their sovereignty. Great Britain and Australia, for example, have enacted retaliatory legislation in response to what they believe to be improper assertions of jurisdiction by United States courts. Moreover, the suits risk incendiary consequences when the commercial dominion of our political and economic adversaries is challenged.

In addition, multinational corporations often must navigate between the strictures of our antitrust laws, threatened with the trebling of any damage they do, and inconsistent competition laws and policies in other countries. Though foreign governments seldom require a corporation to do business in a way which presents antitrust problems, suspect practices are often condoned and encouraged which a "corporation ignores at its own business peril in the foreign market."*

In a period of burgeoning interdependence among nations on the international commercial scene, extraterritorial application of the antitrust laws threatens to interfere with the smooth functioning of our economic and political relations. Moreover, it threatens to impede seriously the growth of U.S. international trade and the world economy.

Judicial attempts to strike a balance between United States and foreign interests in private treble damage actions have largely been unsuccessful. The variety of procedures and principles currently employed by the U.S. courts depend on intrusive and time-consuming foreign discovery and thereby continue to damage our foreign relations. In addition, there is no clear standard to which those who guide international commercial behavior can look to determine when their conduct abroad must comply with our antitrust laws. Finally, the private treble damage remedy continues to cause sharp tensions with our foreign trading partners.

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* 131 Cong. Rec. S1160 (Feb. 6, 1985) (Statement of Sen. DeConcini).

THE PROPOSED ACT

The Foreign Trade Antitrust Improvements Act of 1985 provides: First, that U.S. courts will be required to balance, upon request, the U.S. interest in permitting a private treble damage action to go forward against the interests of any foreign nation adversely affected by the action.* S. 397, § 3. Thus, if, in a court's reckoning, a private** antitrust action unduly interferes with the interests of a foreign nation, the court will dismiss the action.

Second, the Act would permit an early resolution of motions to dismiss for interference with foreign national interests or for lack of subject matter jurisdiction. S. 397, §§ 2 and 3. Thus, for example, a motion to dismiss for lack of subject matter jurisdiction would stay all pretrial proceedings except those deemed by the court to be directly related to the motion. Discovery on the merits of the case would be halted until the court determined that the challenged conduct had "a direct, substantial and reasonably foreseeable effect" on U.S. trade. 15 U.S.C. § 6(a) (1982). A motion to dismiss an action for undue interference with foreign national interests would similarly result in a limited stay of pretrial proceedings pending determination of the motion. The perception of encroachment on foreign interests by private antitrust actions would thereby be diminished.

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* At the request of the court, the Attorney General would present the views of the United States as to the effects of the action on the interests of the U.S. and any affected foreign nation.

** The Act applies only to private actions because the federal agencies charged with enforcing the antitrust laws already balance U.S. and foreign interests before instituting enforcement proceedings which may intrude on foreign interests. See 131 Cong. Rec. S1160 (Feb. 6, 1985) (Statement of Sen. DeConcini).

Third, the Act would permit a court to limit damages awarded to the amount of plaintiff's actual damages. If, after such limited discovery as is deemed necessary by the court, it is established that treble damages would substantially and adversely affect the interests of a foreign nation, and that the adverse effects would be substantially reduced if the claim were limited to actual damages,* only actual damages would be available. Pending determination of a motion to limit damages, only discovery or other proceedings directly related to the motion would be permitted. S. 397, § 5.

Finally, the Act would apply the doctrine of forum non conveniens to private antitrust actions involving foreign trade. S. 397, § 4. Pursuant to this doctrine, a court may decline to hear a case when it determines that another more convenient and appropriate forum exists. Thus, for example, where the challenged conduct occurred within the territorial jurisdiction of a foreign nation, and that nation's competition laws and policies -- while not identical with our own -- promote substantially the same interests, the action will be dismissed in favor of proceedings in the more convenient, foreign forum.

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* At the request of the court, the Attorney General would present the views of the United States on the effects of the limitation on the interests of foreign nations.

COMMENTS

I.

DISMISSAL FOR UNDUE INTERFERENCE WITH FOREIGN NATIONAL INTERESTS

S. 397 directs a court to dismiss a private antitrust action "whenever it determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action." S. 397, § 3. A codification of a judicially-created "jurisdictional rule of reason,"* it requires U.S. courts to consider the interests of other nations before permitting a private treble damage action which will encroach on foreign sovereign interests to proceed.

The Committee supports the rule permitting dismissal of private antitrust actions which are determined to intrude unduly on foreign interests. Our trading partners will be heartened if the U.S. courts attempt to avoid unnecessary encroachments on their interests. In addition, the adoption of a uniform rule in the U.S. courts will allow businesses involved in international commerce to act with more confidence that their conduct is in compliance with our antitrust laws.

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* See e.g., Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976).

The Committee believes, however, that application of the Act will present some practical problems. Thus, in a private treble damage action against multiple foreign defendants, is a court to determine the question of undue interference with foreign interests with respect to each nation? Is it envisioned, for example, that a British defendant could be dismissed from a suit while Honduran and Japanese defendants remain? If so, would the remaining defendants be jointly and severally liable for three times the monetary damage caused by the dismissed defendant? Would the rule be any different if one of the defendants is an American firm? Is this a situation in which a limitation of damages to actual damages would be appropriate?

Alternatively, is it contemplated that a court will be duty-bound to dismiss all defendants if the national interests of one foreign defendant will be substantially and adversely affected by a suit? Does the Act contemplate that an American price-fixer could be relieved of liability because foreign interests against a suit predominate? The Committee assumes that in an action with only minor foreign impact, the court would be obliged to dismiss only so much of the case as offends foreign sovereign interests, but believes, nonetheless, that the legislation should address these questions.

II.

EARLY CONSIDERATION OF FOREIGN INTERESTS AND SUBJECT MATTER JURISDICTION

S. 397 at §§ 2 and 3 provides that a motion to dismiss for undue interference with foreign national interests or for lack of subject matter jurisdiction will stay all pretrial proceedings except those deemed by the court necessary to decide the motion. The Committee also supports the goal of these provisions. Narrowing the scope of pretrial discovery, in particular, will minimize adverse impact on foreign national interests.

The Committee fears, however, that, contrary to its clearly intended purpose, the mandatory stay of pretrial proceedings on the merits of a case could be used to interpose delay. For example, a defendant could stall discovery on the merits by filing a motion to dismiss for lack of subject matter jurisdiction, thereby activating the mandatory stay of discovery on the merits; and then, after disposition of the first motion, filing a second to dismiss for interference with foreign national interests, reactivating the stay; and finally, following disposition on the second motion, filing a third to detreble damages, once again imposing a stay of discovery on the merits.

To counter such a tactic, the Committee believes the Act should impose, instead of the mandatory stay, a presumption that discovery will be stayed by filing one of these motions, but that for good cause shown by the plaintiff discovery on the merits should go forward. In addition, the legislative history of the Bill should encourage the courts to raise sua sponte, and early in a case, the issues of subject matter jurisdiction, interference with foreign national interests, and detrebling. The Committee believes that the suggested provisions would permit the courts to more fully implement the aims of the proposed Act.

III.

DETREBLING

The Committee also supports the provision of S. 397 which limits recovery to plaintiff's actual damages, plus interest and costs, in any case in which substantial adverse effects on the interests of a foreign nation would be reduced if treble damages were not awarded. S. 397, § 5. An aspect of our antitrust laws that is particularly odious to many of our trading partners, the treble damage remedy has harmed our economic and political relations. The proposal gives U.S. courts a means to reduce the adverse effects of extraterritorial application of the antitrust laws short of dismissal. The Committee agrees that this determination should be made on a case-by-case basis, but believes that the legislative history of the Bill should articulate the factors to be considered by courts.

IV.

PRESENTATION OF THE VIEWS OF THE UNITED STATES

The proposed Act permits a court to require the Attorney General to present the views of the United States as to the effects of a private treble damage action on the interests of the United

States and the interests of foreign nations affected. Those views can also be required on the effect of limiting recovery to actual damages on the interests of foreign nations.

The conduct of foreign relations is committed by the Constitution, however, to the Executive and Legislative -- the political -- branches of our government. The propriety of authorizing the Judiciary to insist on a declaration of the Executive's views on matters properly consigned to the political branches is suspect. Accordingly, the Committee suggests that presentation of such views should be left to the discretion of the Executive branch rather than required as the Bill proposes.

The Committee assumes that the Attorney General will honor, though not required by statute to do so, all requests for a presentation of U.S. views on the implications of a private antitrust action. As head of the Department of Justice, the Attorney General is charged with enforcing the Sherman Act and Clayton Act and is in the ideal position from which to assess our national interest in a private antitrust action. The Committee would like it to be clarified, nonetheless, that the proposed legislation is not intended to be an exclusive mechanism for the expression of views on a private antitrust action challenging foreign conduct and that the courts will continue to accept amicus briefs as is the current practice.

V.

FORUM NON CONVENIENS

Finally, the Committee supports the proposed rule requiring application of the doctrine of forum non conveniens in private antitrust actions involving international trade. S. 397, § 4. An action should be dismissed in favor of proceedings in a foreign tribunal when foreign proceedings will be more convenient for the courts and the parties and be in the interests of justice.* The well-settled doctrine of forum non conveniens is currently applicable to actions under the Securities Exchange Act, Lanham Act, and Jones Act. Indeed, antitrust actions are currently the only federal statutory action to which the doctrine is not applied. Although it is often true that U.S. courts are more solicitous than their foreign counterparts of our antitrust laws, the Committee believes that when forum non conveniens principles dictate, the U.S. courts should defer to a more appropriate and convenient foreign forum.

In sum, the Committee believes that the Foreign Trade Antitrust Improvements Act of 1985 will help resolve many of the political tensions which extraterritorial applications of our antitrust laws have engendered. While certain modifications are suggested, the Committee supports the underlying goals of S. 397.

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* See e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1961).

COMMITTEE ON ANTITRUST
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* Subcommittee Chair.

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*** Messrs. Edel, Schiller, and Stein dissent from Part III of this report.

Canadian Embassy   Ambassade du Canada

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4 June 1985

Mr. W. Stephen Cannon
Chief Counsel (Antitrust)
Senate Committee on the Judiciary
Room 2226 SDOB
Washington, D.C. 20510

Dear Mr. Cannon,

I am writing to you to provide you with Canada's views regarding S.397 (The Foreign Trade Antitrust Improvements Bill) on which I understand the Senate Judiciary Committee will be holding a hearing on June 21. I would welcome the opportunity to meet with you to exchange views on the legislation if your schedule permits.

As you know, Canada and the United States have long been committed to working together to avoid or minimize conflicts that might otherwise arise from antitrust suits with international dimensions, and, as a result, have an excellent record of cooperation reflected in bilateral antitrust understandings dating back to 1959. More recently, Canada and the United States signed a new Memorandum of Understanding on notification, consultation and cooperation with respect to the application of national antitrust laws on March 9, 1984. This arrangement has not only served to provide advance warning and to otherwise assist in avoiding or moderating disputes, but has also served to enhance our cooperation in the enforcement of our respective antitrust laws, through, for example, facilitating exchange of information. It is, therefore, in the light of several years experience in addressing the application of U.S. antitrust laws and of good day-to-day working relations with the Antitrust Division of the U.S. Department of Justice and with the Bureau of Competition of the Federal Trade Commission that we offer the following views on S.397, the proposed Foreign Trade Antitrust Improvements Bill.

Canada welcomes the introduction of the Bill by Senator DeConcini as a constructive step towards ensuring that the judicial branch takes proper account of the international impact in general, and the foreign governmental interests in particular, raised by U.S. antitrust suits. In our view, it must be in the best interests of the United States, Canada and other countries, as well as private litigants, to avoid or minimize conflicts that may arise in international antitrust cases, and to reflect basic principles of fairness to private parties, U.S. or foreign, that find themselve caught between inconsistent sovereign interests reflected in laws or policies.

More specifically, certain elements in the Bill indeed reflect concerns that we have from time to time expressed to the Administration. We are encouraged by those sections that:

- explicitly recognize that foreign government interests may be affected adversely by U.S. antitrust suits;
- require Executive Branch intervention in such suits, an aspect crucial to a court's ability to take into account the international implications of its deliberations;
- require appropriate weight to be given to foreign government interests and to the foreign relations implications of such suits; and
- encourage the determination of foreign governmental interests to be made at an early stage in court proceedings, thereby allowing for the possibility of the resolution of the issue without lengthy court proceedings.

There are certain areas, however, in which we would hope the legislation might be further developed beyond the points contained in Senator DeConcini's Bill. First, while we recognize that the Department of Justice and the Federal Trade Commission have increasingly taken foreign interests into account in considering possible antitrust investigation or prosecution, there may still be, from time to time, prosecutions that implicate foreign governmental interests. It is therefore as appropriate in public as in private suits to provide a mechanism whereby the court hearing the case will give proper cognizance to those interests involved.

Second, the Bill does not address explicitly those judicial doctrines of U.S. law, such as foreign government compulsion and act of state, that are designed to ensure that sovereign acts of a foreign state that affect public policy within its territory are not adjudicated in a U.S. court.

Third, the Bill may not be sufficiently clear regarding information that should be before a court to ensure proper weight is given to foreign governmental interests. While the Bill would require the Executive Branch to set forth its views as to a "balancing of interests", it does not require that this be done in a manner which ensures that the court is fully apprised of all information regarding the impact of the suit on the foreign governments concerned. The Bill itself might draw upon Senator DeConcini's remarks in his introduction to make clear that the existing vehicle for the presentation of the views of foreign governments, through *amicus curiae* briefs, remains available as well and that such briefs shall continue to be given appropriate weight and deference.

In a similar vein, the Bill could recognize explicitly the relevance in any "balancing of interests" of the substance and outcome of consultations held pursuant to bilateral and multilateral arrangements. Such a provision would be consistent with the provisions of various bilateral understandings to which the United States is a party, including, for example, the Canada-United States Memorandum of Understanding referred to above.

Finally, while we, of course, recognize that discovery procedures are necessary to the determination of a motion for summary judgement at an early stage of proceedings, it would run counter to the intent and purpose of the Bill to permit such discovery procedures themselves to engender the kinds of conflict that the Bill seeks to minimize or avoid. Thus, the Bill might make clear that such discovery should properly be limited to that which is reasonable in the circumstances, through ensuring that the discovery itself adequately respects foreign governmental interests involved.

In sum, the Government of Canada has long recognized the potential for conflict with foreign sovereign interests presented by U.S. antitrust suits with international dimensions. While it has consistently been our position that such potential conflicts should be resolved intergovernmentally, by the governments concerned, rather than unilaterally by the courts of one of the countries involved, we nonetheless welcome the introduction of S.397 as a constructive step towards ensuring full respect for sovereign acts of a foreign state that give effect to public policy within its territory in U.S. courts.

I am also writing similar letters to the State Department and Justice Department, as well as to the Federal Trade Commission and Senator DeConcini's office.

Yours sincerely,

Anthony F. Burger
Counsellor (Economic)

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE CHAIRMAN

June 25, 1985

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter of April 30, 1985, requesting comments from the Federal Trade Commission (FTC) about S. 397, the "Foreign Trade Antitrust Improvements Act of 1985." While we laud the bill's goal of minimizing conflicts with foreign nations in private international antitrust cases, the approach taken in this legislation raises some serious concerns.

Our most immediate concern is that the proposed legislation may unintentionally compromise the prosecutorial discretion of the Federal Trade Commission. We do not believe that this is an intended effect of the proposed legislation, and strongly urge amendment of S. 397 to make certain that it will not apply to FTC actions. Our concerns about other provisions of the Bill are discussed more fully below.

I. Effect on FTC Jurisdiction

S. 397 amends the Clayton Act to provide that a court shall dismiss "any action brought by any person or State under the antitrust laws" whenever the court "determines that the interests of the United States served by the action are outweighed by the interests of one or more foreign nations adversely affected by the action." It similarly amends the Sherman Act with respect to "any action under the antitrust laws."

We do not believe that S. 397 was intended to apply to actions brought by the FTC. Senator DeConcini, the sponsor of the proposed legislation, specifically recognized[1] that the FTC considers and attempts to accommodate foreign interests by utilizing notification and negotiation procedures provided for in international agreements[2] and bilateral understandings,[3] and has been sensitive to the foreign policy implications of antitrust enforcement.[4]

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[1] Congressional Record, S1160 (daily ed. February 6, 1985) (statement of Sen. DeConcini).

Use of the terms "antitrust laws" and "person" could make S. 397 applicable to FTC actions. Section 1 of the Clayton Act defines the term "antitrust laws" as used in that Act to include the Clayton Act. 15 U.S.C. § 12. The FTC is charged by the Clayton Act with enforcement of Sections 2, 3, 7, and 8 of that Act. The broad language "brought by any person" in S. 397 raises the possibility that the Act could be read to include actions brought by the Federal Trade Commission. The Supreme Court has concluded that whether the term "person" as defined in the Clayton Act includes the United States, for example, would depend on "the purpose, the subject matter, the context, the legislative history, and the executive interpretation" of any statute using the term.[5] A similar analysis could be applied to determine whether the term "person" includes the FTC. Accordingly, S. 397 could have the anomalous effect of subjecting some, but clearly not all, FTC actions to the national interests test provided for in that bill.

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[2] OECD, Recommendation of the Council of the Organization for Economic Cooperation and Development Concerning Co-Operation Between Member Countries On Restrictive Business Practices Affecting International Trade, OECD DOC. C(79)154(1979).

[3] See, e.g., Memorandum of Understanding Between the Government of the United States of America and the Government of Canada As to Notification, Consultation and Cooperation With Respect to the Application of National Antitrust Laws, March 9, 1984; Agreement Between the Government of the United States of America and the Government of Australia Relating to Co-Operation on Antitrust Matters, June 29, 1982; Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Co-Operation Regarding Restrictive Business Practices, June 23, 1976.

[4] The FTC has an opportunity to consider the foreign policy implications of antitrust enforcement when it conducts its public interest analysis and decides whether to exercise prosecutorial discretion. The Federal Trade Commission Act allows the FTC to issue complaints only where the Commission finds an enforcement action to be in the public interest. 15 U.S.C. § 45(b). Likewise, the Commission's power to seek a temporary restraining order or preliminary injunction is constrained by the requirement that the relief be in the public interest. 15 U.S.C. § 53(b).

Because use of the terms "antitrust laws" and "person" makes application of S. 397 to Federal Trade Commission actions possible, we urge that S. 397 be amended to clarify that it does not apply to suits brought by the Federal Trade Commission.

II. Additional Concerns

A. Codification of a "Jurisdictional Rule of Reason"

The Section-by-Section Analysis of S. 397[6] makes clear that the bill is intended to codify what has come to be known as the "jurisdictional rule of reason" devised by the Ninth Circuit in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 615 (9th Cir. 1976). In Timberlane, the Ninth Circuit held that United States courts have jurisdiction to adjudicate the legality under the antitrust laws of acts done outside the territory of the United States if those acts affect or were intended to affect the foreign commerce of the United States. The court proposed, however, that courts exercise extraterritorial jurisdiction, once found to exist, only when it seems appropriate to do so as a matter of international comity and fairness. The Ninth Circuit considered several factors in the course of making its comity and fairness determination. The best formulation of the kinds of factors which should be considered, however, is found in Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

A recent change in the legal test for the existence of extraterritorial jurisdiction will reduce the number of instances requiring a Timberlane analysis to determine whether a court should exercise jurisdiction. The Foreign Trade Antitrust Improvement Act of 1982 adopted a "direct, substantial and reasonably foreseeable" effects test for extraterritorial jurisdiction.[7] In light of this new, more stringent test[8] and the fact that, in many private antitrust cases, foreign defendants may avail themselves of act of state[9] or foreign sovereign compulsion[10] defenses, occasions for judicial consideration of abstention based on comity will be fewer in number in the future. Therefore, we believe codification of the Timberlane test is unnecessary.

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[5] U.S. v. Cooper Corp., 312 U.S. 600, 605 (1941). Section 8 of the Sherman Act includes the same definition of "person" as Section 1 of the Clayton Act.

[6] Congressional Record, S1162 (daily ed. February 6, 1985).

In addition to being unnecessary, codification of the Timberlane test is undesirable because S. 397 specifies neither the factors that constitute foreign and United States interests nor how those factors should be weighed. Moreover, although the bill provides for limited discovery on jurisdictional issues, it would be difficult for a court to balance foreign and United States interests without allowing discovery going to the merits of an antitrust claim because the United States interest in antitrust enforcement may vary depending on the type and magnitude of the alleged antitrust law violation.

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[7] Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a).

[8] Before enactment of the Foreign Trade Antitrust Improvements Act of 1982, courts used different tests of extraterritorial jurisdiction. For example, some required substantiality, others directness and substantiality.

[9] The act of state doctrine is a common law affirmative defense which may be asserted either by a foreign sovereign or by a private party defendant. While required by neither constitutional nor international law, the act of state doctrine has constitutional and international law "underpinnings." When successfully asserted, the act of state defense justifies United States courts' abstention from deciding cases, when nonabstention would necessitate adjudication of the legality of the acts of a foreign sovereign. The act of state defense thus prevents courts from offending the foreign sovereign or interfering with the foreign relations powers exercised by the Executive Branch. The applicability of an act of state defense depends on the "balance of relevant considerations" in any given case, including the degree of international consensus about a rule of law, the degree of affront to a foreign nation, and the foreign policy implications for the United States. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964).

[10] Foreign sovereign compulsion is a common law affirmative defense. A private party invoking this defense asks United States courts to abstain from adjudicating a claim which, if successful, would hold the defendant liable for acts which it was compelled to perform by a foreign sovereign. See, e.g., International Refining Corp. v. Texaco Maricaibo, Inc., 307 F. Supp 1291 (D. Del. 1970).

Therefore, we view S. 397's codification of Timberlane's "jurisdictional rule of reason" as unnecessary, lacking in specificity, and procedurally unworkable.

B. Forum Non Conveniens Dismissal

We have no objection to statutory resolution of the judicial dispute whether antitrust suits involving foreign commerce may be dismissed to a more convenient foreign forum. However, we believe that *forum non conveniens* dismissal of such antitrust suits would be appropriate only where the traditional requirements for *forum non conveniens* are met: that is, where the foreign forum provides an equivalent opportunity for adjudication[11] and relief,[12] where the alternative forum is significantly more convenient,[13] and where manifest injustice would result from a failure to dismiss.[14]

S. 397 is silent about the applicability of this traditional *forum non conveniens* analysis. We think the bill should be amended to clarify that the traditional requirements for *forum non conveniens* must be met. Application of a weaker test would deprive plaintiffs of remedies for antitrust injury.

C. Actual Damages Limitation

We oppose S. 397's treble damages provision and urge the committee to consider deleting that provision. As long as United States corporations remain at risk of treble damages, foreign corporations doing substantial business in the United States should remain subject to a similar risk for egregious violations of the antitrust laws.

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[11] *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

[12] *Swift & Co. Packers v. Columbiana Del Caribe*, 339 U.S. 684 (1950).

[13] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

[14] *See*, *e.g.*, *Mobil Tankers Co. S.A. v. Mene Grande Oil Co.*, 363 F.2d 611 (3d Cir.) *cert. denied*, 385 U.S. 945 (1966); *Burt v. Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955).

If not stricken, S. 397's treble damages provision should be amended to give courts more guidance about what constitutes a substantial effect on foreign interests and what constitutes a substantial reduction in the effect on those interests. In addition, the bill should be amended to assure analysis of United States interests in the imposition of treble damages, before a motion to limit damages to actual damages is granted.

S. 397 also should indicate whether courts should regard discovery-blocking or treble damage "claw back" statutes like the British Protection of Trading Interests Act[15] as evidence of a substantial adverse effect on foreign interests. If such foreign laws were to be regarded by courts as evidence of a substantial adverse effect on foreign interests, it might encourage United States or foreign corporations to locate in countries where they could invoke the protection of such laws and it may well encourage more countries to enact similar "blocking" and "claw back" provisions.

S. 397 gives no guidance to courts about how to judge whether detrebling will reduce the adverse effect on foreign interests substantially. Foreign governments could argue that if damages amount to any "substantial" sum of money, limitation to actual damages would reduce the effect on their interests substantially. As a result, plaintiffs would be limited to single damages in almost all cases brought against foreign defendants.

S. 397 should include some mechanism for weighing the United States interest in the imposition of treble damages, as punishment or as a deterrent, against the adverse effect on foreign interests. Treble damages have been regarded as a deterrent for violations which are difficult to detect, such as agreements among competitors to fix prices. Limiting foreign defendants' exposure to risk of single damages will remove the deterrent effect of the treble damages threat, and could encourage more frequent or more egregious antitrust violations.

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[15] The British Protection of Trading Interests Act of 1980 enables the Secretary of State to prohibit the production of commercial documents prejudicial to United Kingdom interests by any United Kingdom person in foreign courts, prevents United Kingdom enforcement of treble damage awards by foreign courts, and allows defendants to recover non-compensatory damages paid from plaintiffs. The Protection of Trading Interests Act of 1980 was invoked by defendants in *Laker Airways Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

III. Conclusion

The Federal Trade Commission respectfully urges that S. 397 be amended to assure that the Bill will not affect FTC enforcement actions. We also encourage consideration of the Commission's additional concerns with the Bill's implications for antitrust enforcement and for the non-discriminatory imposition of treble damages for egregious violations of the antitrust laws.

By direction of the Commission. Commissioner Calvani dissented as to Part II of the letter.

James C. Miller III
Chairman